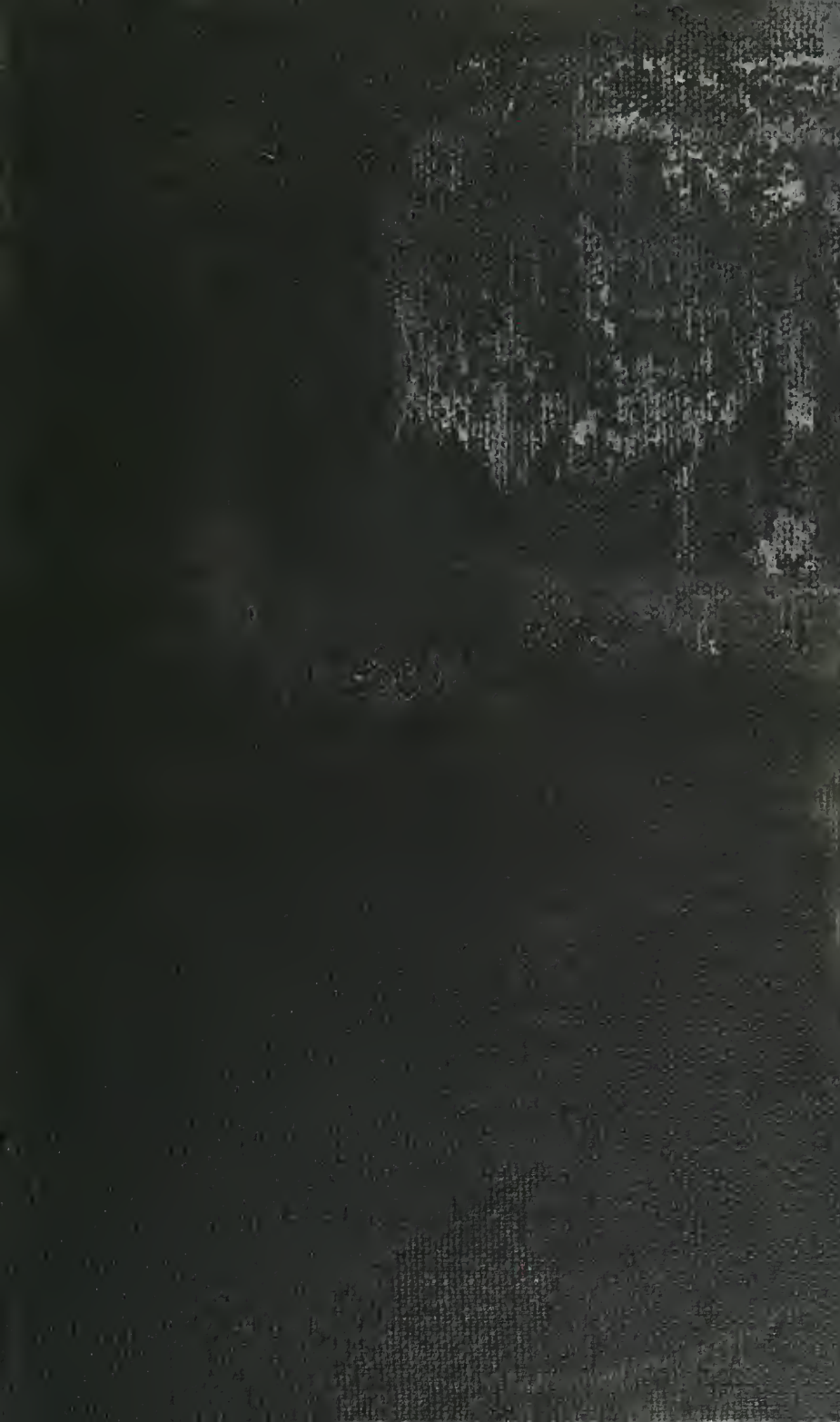


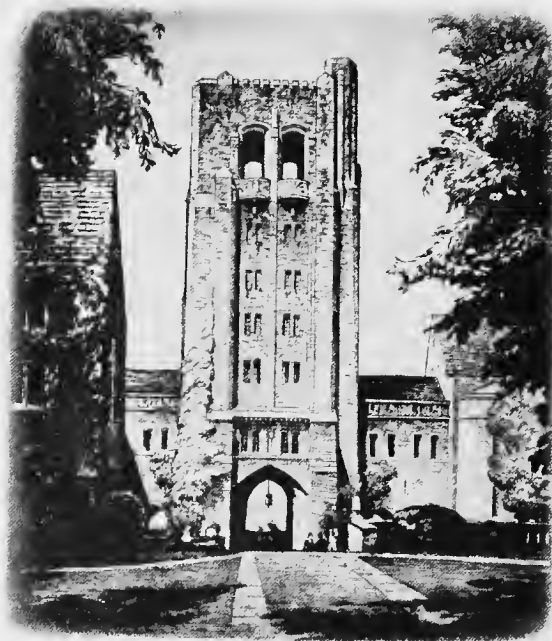


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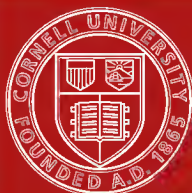
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THE ELEMENTS
OF THE
AMERICAN LAW OF SALES
OF
PERSONAL PROPERTY.

BY
IRVING BROWNE,
AUTHOR OF "DOMESTIC RELATIONS," "CRIMINAL LAW,"
"PAROL EVIDENCE," ETC.

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PREFACE.

THE chief purpose of this manual is to furnish a concise treatise for the use of law students and their instructors, of a character similar to that of the author's manuals of "Domestic Relations," and "Criminal Law." Direct reference to English authorities has generally been omitted, because the American law on the subject is independent and well developed, and the English cases are amply considered in the American decisions cited, and also form the basis of Mr. Benjamin's well-known and popular treatise. The author has followed Mr. Benjamin's excellent arrangement, and acknowledges his obligation to Mr. Bennett's admirable notes to the latest American edition of Mr. Benjamin's work, in the matter of citations. Nothing can be more excellent than Mr. Bennett's copious and classified selection of authorities, and generally his deductions from them. In some instances in which the author has felt constrained to dissent from his conclusions, he has done so with the diffidence becoming to one who ventures to differ from a distinguished expert. The author has chosen his authorities in large meas-

ure from the so-called "American system," of reports, and by citation of that series, and of the "Lawyer's Reports Annotated" he hopes to commend his work to the practitioner, as well as the professor and the student, as a convenient and trustworthy guide.

IRVING BROWNE.

BUFFALO, N. Y

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SALES OF PERSONAL PROPERTY.

PART I.

FORMATION OF THE CONTRACT AT COMMON LAW.

CHAPTER I.

DEFINITION, FORM, AND ESSENTIAL ELEMENTS.

AT common law a sale of personal property is generally defined as a "bargain and sale of goods." A more complete definition would be: a present transfer, by one in his individual capacity, of the absolute property in a thing for money. It is distinguished from a bailment or mortgage or lease by the passing of absolute title; from an executory contract by the passing of title at once; from a gift by the consideration; from barter or exchange by the pecuniary character of the consideration.¹ Strictly

¹ As a sale implies a transfer of property for money, so it has been held that when a liquor dealer furnishes liquor, and receives in payment therefor pool checks which he had previously sold, worth the price of the liquor, the transaction is not a sale but a

speaking, it does not embrace transfers by persons in a representative capacity or by judicial process.

On a contract to sell in future, even a specified thing, no present title passes.^{1a} But the words "I agree to sell" and "to buy" do not necessarily imply a future sale;² nor do the words "A buys" and "B sells" conclusively denote a present sale.³ The question is determined by the intention to be gathered from the circumstances.⁴

Sale or Bailment.—If the identical thing delivered is to be returned, even in an altered form, it is a bailment; but if the receiver is at liberty to return another thing, either in the same or a different form, or to pay money, at his option, it is a sale, title passes, and the property is at the risk of the receiver. So where grain is to be returned as meal, lumber as boards, leather as shoes, or wool as cloth, it is a bailment, and the risk is upon the bailor.⁵ Even if the

barter. *Massey v. State*, 74 Ind. 368. A delicate question as to what constitutes a sale has frequently arisen, in criminal and tax cases, in respect to liquors furnished by a club to its members. See note, 32 Am. Rep. 433; *Graff v. Evans*, 8 Q. B. Div. 373; *Seim v. State*, 55 Md. 566; 39 Am. Rep. 419; *Tennessee Club v. Dwyer*, 11 Lea, 452; 47 Am. Rep. 298.

^{1a} *Joyce v. Adams*, 8 N. Y. 291; *Elliott v. Stoddard*, 98 Mass. 145; *Powder Co. v. Burkhardt*, 97 U. S. 110.

² *Martin v. Adams*, 104 Mass. 262.

³ *Sherwin v. Mudge*, 127 Mass. 547.

⁴ *Decker v. Furniss*, 14 N. Y. 615.

⁵ *Foster v. Pettibone*, 7 N. Y. 433; 57 Am. Dec. 530; *Barker v. Roberts*, 8 Greenl. 101; *Mansfield v. Converse*, 8 Allen, 182; *Brown v. Hitchcock*, 28 Vt. 452; *Woodward v. Semans*, 125 Ind. 330; 21 Am. St. Rep. 225. In the last case it is said, by ELLIOTT, J.: "It is the law of this jurisdiction, as well as of many others, that where a

receiver agrees to pay a certain sum "if he does not return the property," this does not necessarily import a sale.⁶ And where one delivered grain to an elevator, taking a memorandum that it was "bought, at owner's risk as to fire," and the receiver subsequently made an offer for it, which was refused, and it was the custom thus to receive grain and buy or return it, this did not constitute a sale.⁷ But if, by contract or usage, the identical thing is not to be returned, but only its equivalent, either in the same form or some other, or paid for in money, at the receiver's option, it is a sale or exchange, title passes on delivery, and

warehouseman receives grain on deposit for the owner, to be mingled with other grain in a common receptacle from which sales are made, the warehouseman keeping constantly on hand grain of a like kind and quality for the depositor, and ready for delivery to him on call, the contract is one of bailment and not of sale. The agreement "in this case "is to yield property in exchange for property, and this is essentially a contract of sale. The appellees were entitled to a designated quantity of flour and bran for each bushel of wheat delivered by them, but they were not entitled to the flour and bran produced from the particular wheat delivered by them to the appellants. There was therefore no undertaking to restore the wheat either in its original form or in an altered form. In *Bretz v. Diehl*, 117 Pa. St. 589; 2 Am. St. Rep. 706, the court said: 'The fundamental distinction between a bailment and a sale is, that in the former, the subject of the contract, although in an altered form, is to be restored to the owner; whilst in the latter there is no obligation to return the specific article; the party receiving it is at liberty to return some other thing of equal value in place of it.' " The court cite also *Norton v. Woodruff*, 2 N. Y. 153; *Jones v. Kemp*, 49 Mich. 9. In the former an agreement by a miller to "take" wheat and "give" flour in return was held to import a sale and not a bailment. Strictly speaking, such a contract is an agreement of barter rather than of sale.

⁶ *Westcott v. Thompson*, 18 N. Y. 363.

⁷ *Irons v. Kentner*, 51 Iowa, 88; 33 Am. Rep. 119.

the risk is upon the receiver.⁸ The words, "at the risk of the owner" indicate a bailment.⁹ Where the agreement is that the warehouseman may sell any or all of the grain deposited on storage, and return it on demand or pay the market-price ruling at the time of demand, and he sells so much that there is not enough left to replace the amount delivered to him, at the time his warehouse and its contents were destroyed by fire, he is liable for the value of the whole, because the transaction was a sale and not a bailment, although he had made advances on the grain.^{9a}

In the case of deposit of grain in a warehouse or elevator, with knowledge that it will be mingled with other grain and sold, and its place supplied by other grain, the recent tendency is to regard the transaction as effecting a tenancy in common with all the other depositors.¹⁰

Sale or Consignment.—Generally, if goods are consigned for sale, it is a bailment.¹¹ Even though on a *del credere* commission;¹² or at a stated price;¹³ unless it is expressly provided that when sold the consignee

⁸ *Ewing v. French*, 1 Blackf. 354; *Smith v. Clark*, 21 Wendell, 83; 34 Am. Dec. 215; *Norton v. Woodruff*, 2 N. Y. 153; *Butterfield v. Lathrop*, 71 Pa. St. 226; *Bailey v. Bensley*, 87 Ill. 556; *So. Am. Ins. Co. v. Randell*, L. R. 3 P. C. C. 101.

⁹ *Ledyard v. Hibbard*, 48 Mich. 421.

^{9a} *Cloke v. Shafroth*, 137 Ill. 393; 31 Am. St. Rep. 375.

¹⁰ *Cushing v. Breed*, 14 Allen, 376; 92 Am. Dec. 777; *Schindler v. Westover*, 99 Ind. 395; *Broadwell v. Howard*, 77 Ill. 305; *Bretz v. Diehl*, 117 Pa. St. 604; 2 Am. St. Rep. 706.

¹¹ *Meldrum v. Snow*, 9 Pick. 441.

¹² *Converseville Co. v. Chambersburg Co.*, 14 Hun, 609.

¹³ *Pam v. Vilmar*, 54 How. Pr. 235.

is to be regarded as the purchaser.¹⁴ Delivery of goods with a privilege to purchase or return, or to try, is only a bailment until election.¹⁵ But unless return is made within a reasonable time, it is a sale.¹⁶ In case of delivery with option to purchase, title does not pass until election;¹⁷ but on purchase with option to return, title passes at once, subject to defeat by the exercise of the option.¹⁸ On a transfer with a promise to pay on a certain day or return, title passes on delivery.¹⁹

Sale or Lease.—In recent years such personal property as musical instruments and sewing machines is frequently transferred upon what is commonly called the “instalment plan,” under a writing binding the receiver to pay a stated sum at specified times “as rent” for it, and providing that after a certain amount is thus paid the property shall belong to the receiver. Many courts hold these transfers to be sales, and not leases,²⁰ and so that a forfeiture of

¹⁴ *Nutter v. Wheeler*, 2 Lowell, 346.

¹⁵ *Hunt v. Wyman*, 100 Mass. 198; *Dando v. Foulds*, 105 Pa. St. 74.

¹⁶ *Ray v. Thompson*, 12 Cush. 281; 60 Am. Dec. 187; *Fuller v. Buswell*, 34 Vt. 108.

¹⁷ *Wilson v. Stratton*, 47 Me. 120; *Chamberlain v. Smith*, 44 Pa. St. 431.

¹⁸ *Schlesinger v. Stratton*, 9 R. I. 578; *Hotchkiss v. Higgins*, 52 Conn. 205; 52 Am. Rep. 582.

¹⁹ *McKinney v. Bradlee*, 117 Mass. 321; *Marsh v. Wickham*, 14 Johns. 167; *Walker v. Blake*, 37 Me. 373.

²⁰ *Greer v. Church*, 13 Bush, 430; *Singer Manuf. Co. v. Cole*, 4 Lea, 439; 40 Am. Rep. 20; *Murch v. Wright*, 46 Ill. 487; *Hervey v. R. I. Locomotive Works*, 93 U. S. 664; *Gross v. Jordan*, 83 Maine,

the payments made cannot be declared on retaking an article for default of further payments under a so-called lease, which is in fact a conditional sale with retention of title as security; but the purchaser is entitled to pay the sum due, or to have the article sold and a return to him of any surplus proceeds after paying the debt and expenses of sale.^{20a}

Such instruments frequently provide that title shall remain in the owner until payment, and reserve to the owner the privilege of reclaiming on default. Such transfers can amount to no more than condi-

380; *Summerson v. Hicks*, 134 Pa. St. 566; *Lucas v. Campbell*, 88 Ill. 447; *Latham v. Sumner*, 89 Ill. 233; 31 Am. Rep. 79; *Knittel v. Cushing*, 57 Tex. 354; 44 Am. Rep. 598. For example, in *Singer Manuf. Co. v. Cole*, *supra*, the court said: "The fact that it was called a renting does not make it so. In order to make it a renting of a purchased machine, we must say it was sold for nothing, and then rented to the purchaser by the vendor for fifteen months for ninety-five dollars, this being the only sum of money ever agreed to be paid. This would be absurd." And in *Loomis v. Bragg*, 50 Conn. 228, the court said: "The sum to be paid is the entire present value of the piano, that is, \$140. That sum, with the interest, is to be paid in a little more than two years, when the instrument would be nearly as valuable as it was at the outset. It is incredible that the defendant would be willing to pay as rent the entire value of the instrument in so short a time, or that the plaintiff would be rapacious enough to demand it. Indeed, the fact that the piano was by the contract to be the defendant's when the amount should be paid, shows decisively that the monthly sums were to be paid not as rent, but as the purchase price. Furthermore, it was thought important by the plaintiff that it should be provided that if the defendant should at any time fail to pay the stipulated sums when due, he should lose the piano, and that all that had been paid should belong to the plaintiff. There was no necessity for this if the contract was for a lease of the property."

^{20a} *Puffer & Sons Manuf. Co. v. Lucas*, 112 N. C. 377; 19 Lawy. Ann. Rep. 682.

tional sales,²¹ and will be more fully treated hereafter under that head.

Sale with privilege of return.—A delivery of goods to be accounted for and the balance not desired to be returned, passes immediate title to the whole.²²

Whether a sale is *executed* or *executory* depends on the intention and circumstances,²³ and is a question of fact,²⁴ subject to the power of the court to direct a verdict.²⁵ If the intention is thus left undeterminable, the presumption is that there was a present sale if the subject is specified, pointed out, agreed on, and ready for delivery ;²⁶ otherwise it is executory.²⁷

²¹ Hine v. Roberts, 48 Conn. 267; 40 Am. Rep. 170; Loomis v. Bragg, 50 Conn. 228; 47 Am. Rep. 638; Sargent v. Gile, 8 N. H. 325; Goodell v. Fairbrother, 12 R. I. 233.

²² Hotchkiss v. Higgins, 52 Conn. 205; 52 Am. Rep. 582.

²³ Hatch v. Oil Co., 100 U. S. 131; Terry v. Wheeler, 25 N. Y. 525; Callaghan v. Myers, 89 Ill. 570; Fletcher v. Ingram, 46 Wis. 201; Weed v. Boston Ice Co., 12 Allen, 377; Stone v. Peacock, 35 Me. 388.

²⁴ Dyer v. Libby, 61 Me. 45; Fuller v. Bean, 34 N. H. 290; Merch. Nat. Bk. v. Bangs, 102 Mass. 296; Wilkinson v. Holiday, 33 Mich. 386.

²⁵ Wigton v. Bowley, 130 Mass. 254.

²⁶ Riddle v. Varnum, 20 Pick. 283; Bethel Steam M. Co. v. Brown, 57 Me. 1; 99 Am. Dec. 752.

²⁷ Stephens v. Santee, 49 N. Y. 35.

CHAPTER II.

THE PARTIES.

It is essential to a valid contract of sale that the seller should be the owner, or represent the owner, of the thing sold, and that both seller and purchaser should be legally qualified to contract.

Ownership.—As a rule the ownership must be vested in the seller. No one can give good present title to that which he does not own.¹ He may make a binding contract to sell in the future something which he does not yet own or which is not yet in existence, and this power will be considered hereafter.

To this general rule there are certain exceptions.

Market Overt.—By the law of England an innocent purchaser gets good title to goods publicly sold in

¹ *Smith v. Clews*, 114 N. Y. 190. Every one is bound at his peril to ascertain in whom the real title is vested, and he must abide the result of a mistake, no matter how diligent he may have been, in endeavoring to ascertain the title. *Velsian v. Lewis*, 15 Oreg. 539; 3 Am. St. Rep. 184. The purchaser under a defective title gets none. *Roach v. Turk*, 9 Heisk. 708; 24 Am. Rep. 360; *Saltus v. Everett*, 20 Wend. 267; 32 Am. Dec. 541. So where the owner of a diamond ring put it into the hands of a jeweler to match, or failing in that, to get an offer for it, and the jeweler sold it to a purchaser who bought in good faith, the latter got no title. *Levi v. Booth*, 58 Md. 305; 42 Am. Rep. 332.

open public market, although the seller does not own them, or even came by them unlawfully. But this doctrine does not prevail in this country.²

Negotiable Paper.—By the English law merchant which prevails in this country, any holder of negotiable notes or bonds may confer a valid title to an innocent purchaser for value, before maturity, in the ordinary course of business.³

Pledgees, after default, may give good title, without judicial process, but upon due notice.⁴

An *agent* for selling, wrongfully selling, property as his own to an innocent purchaser for a fair price, gives good title, and the principal cannot recover the property from the buyer.^{4a} This is on the ground that the innocent buyer should not suffer from the act which the seller enabled the agent to do.

A master of a vessel has implied power to sell ship and cargo in cases of extreme necessity,⁵ but in no other.

² *Towne v. Collins*, 14 Mass. 500; *Smith v. Clews*, 114 N. Y. 190; 11 Am. St. Rep. 627; *Wheelwright v. DePeyster*, 1 Johns. 470; 3 Am. Dec. 345; *Ventress v. Smith*, 10 Peters, 161; *Browning v. Magill*, 2 Harr. & Johns. 308; *Bryant v. Whitcher*, 52 N. H. 158; *Easton v. Worthington*, 5 Serg. & R. 130; *Jones v. Nellis*, 41 Ill. 482; *Mestling v. Hughes*, 89 Ill. 389.

³ *Swift v. Tyson*, 16 Peters, 1; *Seybel v. Nat. Currency Bank*, 54 N. Y. 288; 13 Am. Rep. 583; *Vermilye v. Adams Ex. Co.*, 21 Wall. 138; *Spooner v. Holmes*, 102 Mass. 503; 3 Am. Rep. 491.

⁴ *Stearns v. Marsh*, 4 Denio, 227; 47 Am. Dec. 248; *Washburn v. Pond*, 2 Allen, 474.

^{4a} *Dias v. Chickering*, 64 Md. 348; 54 Am. Rep. 770.

⁵ *The Amelie*, 6 Wall. 26; *Howland v. India Ins. Co.*, 131 Mass. 255; *Gates v. Thompson*, 57 Me. 442; 99 Am. Dec. 782.

Factors are empowered by statute in many States to give title.

Infants.—The contract of an infant to buy or sell is generally not void, but voidable only at his election.⁶ At his election the other party is always bound. But he is bound by his contract for necessities, which include food, lodging, clothing, medical attendance, and a common education, and the character of these is measured by his fortune and position in society.⁷ This doctrine, however, is limited to personal wants and does not apply to business contracts, such as for feed for horses, farming supplies, and lumber for a house.⁸ But it extends to necessary articles for

⁶ *Harner v. Dipple*, 31 Ohio St. 72; 27 Am. Rep. 496; *Owen v. Long*, 112 Mass. 403; *Curtin v. Patton*, 11 Serg. & R. 305; *Mustard v. Wohlford*, 15 Gratt. 329; 76 Am. Dec. 209. In *Hall v. Butterfield*, 59 N. H. 354; 47 Am. Rep. 209, it was however held that an infant buying goods not necessities, on credit, and not returning them, is liable for an amount equal to the benefit derived by him. The court say: "No reason appears why the wise and just principle enunciated by Lord Mansfield should not be given its full force, and the rights and obligations of lunatics, persons *non compos mentis*, drunkards when in such a state of mind as not to be entirely bereft of reason, and infants be placed on the same ground. The right to recover for necessities is given because the infant has derived a benefit therefrom. It is upon no other ground. If the benefit is the foundation of the right, why should it be limited to necessities? It cannot be said that the infant, if engaged in trade or business, may not derive a benefit therefrom. If benefit obtained by the infant is the test in one case, why not make it the test in all cases? This has been made the test in the case of lunatics and persons *non compos mentis*, and it should be applied in the case of infants."

⁷ Browne's Dom. Rel., pp. 109-111.

⁸ *Merriam v. Cunningham*, 11 Cush. 40; *Decell v. Lewenthal*, 57 Miss. 331; 34 Am. Rep. 449; *Freeman v. Bridger*, 4 Jones L. 1; 67 Am. Dec. 258. *Contra*: *Hall v. Butterfield*, 59 N. H. 354; 47 Am. Rep. 209.

his wife and children.⁹ The articles must be actually necessary; if he is already supplied, he may evade liability.¹⁰ His emancipation does not enlarge his liability.¹¹ As to non-necessaries he is not estopped, in an action on the contract, by his false representation that he was of full age.¹² His purchase of such however may be conclusively ratified after he becomes of age, as by a direct promise to

⁹ *Price v. Sanders*, 60 Ind. 311.

¹⁰ *Johnson v. Lines*, 6 W. & S. 80; 40 Am. Dec. 542.

¹¹ *Mason v. Wright*, 13 Metc. 306.

¹² *Baker v. Stone*, 136 Mass. 405; *Sims v. Everhardt*, 102 U. S. 300; *Studwell v. Shapter*, 54 N. Y. 249; *Conrad v. Lane*, 26 Minn. 389; 37 Am. Rep. 412; *Wieland v. Kobick*, 110 Ill. 16; 51 Am. Rep. 676; *Neff v. Landis*, 110 Penn. St. 204; *Nash v. Jewett*, 61 Vt. 501; 15 Am. St. Rep. 931. This question has been somewhat disputed. The majority of the cases are founded on the theory that an engagement which at the infant's election may not be construed as a binding contract, is made none the more valid by his fraud in inducing the other party to enter into it. On the other hand the theory is, that the fraud is a tort and an infant is always liable for his torts. To which it is replied that this cannot be done in an endeavor to enforce the contract. And many cases deny even the infant's liability in a direct action for the fraud. *Merriam v. Cunningham*, *Studwell v. Shapter*, *Nash v. Jewett*, *supra*. But in *Rice v. Boyer*, 108 Ind. 472; 58 Am. Rep. 53, the court concluded: "We are unwilling to sanction any rule which will enable an infant who has obtained the property of another by falsely and fraudulently representing himself to be of full age, to enjoy the fruits of his fraud, either by keeping the property himself or selling it to another, and when asked to pay its just and reasonable value, successfully plead his infancy. Such a rule would make the defence of infancy both a shield and a sword, and this is a result which the principles of justice forbid, for they require that it should be merely a shield of defence." To the same effect, *Schmitheimer v. Eiseman*, 7 Bush, 298; *Kilgore v. Jordan*, 17 Tex. 341. This view is approved by Mr. Freeman, note, 33 Am. Dec. 185. And so an action for deceit was sustained. In England the infant may be held for the price in equity. *Lemprière v. Lange*, 12 Ch. Div. 675; *Ex parte Unity*, etc., Ass'n., 3 DeG & J. 63.

pay, or by part payment,¹³ but not by mere silence, or acknowledgment of the justice of the claim.¹⁴ Slight declarations indicating a recognition of the contract will warrant a verdict.¹⁵ In general, retaining and using and enjoying the property after majority, or selling or mortgaging it, will work a ratification.¹⁶ But mere lapse of time will not work a ratification.¹⁷ He cannot retain the goods and avoid paying the price.¹⁸ If he has sold goods and wasted the consideration before majority, he may recover the property without refunding.¹⁹ Any act showing an intention not to be bound will work an avoidance.²⁰ He may avoid his sale even during minority, and although the property has passed to an innocent third person.²¹ But the election to avoid must be made within a reasonable time after majority.²² It has been held that it is not essential to a binding ratification that

¹³ Proctor v. Sears, 4 Allen, 95; Henry v. Root, 33 N. Y. 526.

¹⁴ Proctor v. Sears, *supra*; Wilcox v. Roath, 12 Conn. 550; Chandler v. Glover, 32 Penn. St. 509.

¹⁵ Hoit v. Underhill, 9 N. H. 436; 32 Am. Dec. 380; Bay v. Gunn, 1 Denio, 108; Whitney v. Dutch, 14 Mass. 457; Minock v. Shortridge, 21 Mich. 304.

¹⁶ Chapin v. Shafer, 49 N. Y. 407; Lawson v. Lovejoy, 8 Me. 405; 23 Am. Dec. 526; Boyden v. Boyden, 9 Metc. 519.

¹⁷ Sims v. Everhardt, 102 U. S. 300.

¹⁸ Kline v. Beebe, 6 Conn. 494.

¹⁹ Green v. Green, 69 N. Y. 553; 25 Am. Rep. 233; Dill v. Bowen, 54 Ind. 204; Miller v. Smith, 26 Minn. 248; 37 Am. Rep. 407.

²⁰ State v. Plaisted, 43 N. H. 413.

²¹ Towle v. Dresser, 73 Me. 252; Shipman v. Horton, 17 Conn. 481; Carr v. Clough, 26 N. H. 480; 59 Am. Dec. 345.

²² Bingham v. Barley, 55 Tex. 281; 40 Am. Rep. 801; Keil v. Healey, 84 Ill. 104; 25 Am. Rep. 434; but see Gillespie v. Bailey, 12 W. Va. 70; 29 Am. Rep. 445.

the party should know that he was not legally liable.^{22a} But the contrary seems more reasonable and better supported.^{22b} The question whether his note, bond, or deed given for necessities is binding, has been mooted. He may undoubtedly ratify it at majority, but the better opinion is that such an instrument is binding, as it can hardly be less effectual than a mere implied promise.^{22c}

Married women, at common law, being under disability to contract, are not bound by a contract of purchase or sale, and such a contract is absolutely void.²³ So that a ratification is not effected by a new promise after becoming single.²⁴ Unlike an infant, a married woman is not primarily bound even for necessities for her personal use, the husband being liable for these; but a new promise by her, after becoming single, to pay for such, will bind her.²⁵ Modern statutes have however in many States granted to married women the right to contract with more or

^{22a} *Morse v. Wheeler*, 4 Allen, 590; *Taft v. Sergeant*, 18 Barb. 320; *Ring v. Jamison*, 66 Mo. 424; *Anderson v. Soward*, 40 Ohio St. 325; 48 Am. Rep. 687.

^{22b} *Baker v. Kennett*, 54 Mo. 82; *Petty v. Roberts*, 7 Bush, 410; *Curtin v. Patton*, 11 Serg. & R. 305; *Hinely v. Margaritz*, 3 Barr, 428; *Chambers v. Wherry*, 1 Bailey, 28; and see *Owen v. Long*, 112 Mass. 403; *Tobey v. Wood*, 123 Mass. 88; 25 Am. Rep. 27.

^{22c} *Bradley v. Pratt*, 23 Vt. 378; *Earle v. Reed*, 10 Metc. 387; *Walter v. Even*, and 65 L. T. Rep. (N.S.) 443.

²³ *Waters v. Bean*, 15 Ga. 358; *Kennerly v. Martin*, 8 Mo. 698.

²⁴ *Hayward v. Barker*, 52 Vt. 429; 36 Am. Rep. 762; *Musick v. Dodson*, 76 Mo. 624; 43 Am. Rep. 780; *Porterfield v. Butler*, 47 Miss. 165; 12 Am. Rep. 329.

²⁵ *Goulding v. Davidson*, 26 N. Y. 604; 28 Barb. 438; *Hubbard v. Bugbee*, 55 Vt. 506; 45 Am. Rep. 637; *Vance v. Wells*, 8 Ala. 399; *Hemphill v. McClimans*, 24 Pa. St. 367.

less fulness, and under these she may bind her estate for necessities.²⁶ At common law however the wife had, and still has, power, by an implied agency, to bind her husband for necessities for herself, such as food, clothing, etc., and these are determinable in character and amount by the social position of the husband and wife.^{26a} But this power exists only where the husband refuses or neglects to supply the wife; and therefore if he is willing and ready to supply her, or has given her sufficient money therefor, and has forbidden her to pledge his credit, he cannot be made liable for necessities thus obtained by her.^{26b} But he may be held to such purchases by an assent implied from his previous recognition of similar purchases.^{26c} He may prohibit particular persons from selling goods to his wife on his credit, ^{26d} but notice in the newspapers is not sufficient.^{26e} She may bind him, in case of his neglect or refusal, even against his express prohibition.^{26f} If they live apart, the husband is liable if the separation is by his fault, but not otherwise.^{26g} In some instances it is thought she

²⁶ Browne Dom. Rel. 4-53; *Priest v. Cone*, 51 Vt. 495; 31 Am. Rep. 695.

^{26a} Browne Dom. Rel. 19-25.

^{26b} *Debenham v. Mellon*, 6 App. Cas. 24; *Pierpont v. Wilson*, 49 Conn. 450.

^{26c} *Ogden v. Prentice*, 33 Barb. 160; *Seaton v. Benedict*, 5 Bing. 328.

^{26d} *McCutchen v. McGahay*, 11 Johns. 281.

^{26e} *Walker v. Loughton*, 11 N. H. 111.

^{26f} *Keller v. Philips*, 40 Barb. 390.

^{26g} Browne Dom. Rel. 22-32; *Brown v. Mudgett*, 40 Vt. 68; *Reese v. Chilton*, 26 Mo. 598; *Oinson v. Heritage*, 45 Ind. 73; 15 Am. Rep. 258.

herself may be liable for necessities procured in her absence, but this can only be when the husband is out of the State or country.^{26h} If the parties live apart by consent, and the husband pays the wife a reasonable allowance, with regularity, this absolves him; ²⁶ⁱ so if he pays decreed alimony, though insufficient; ^{26j} or if she has sufficient income from an ante-nuptial agreement.^{26k} An infant husband is liable for his wife's necessities.^{26l}

Lunatics.—The purchases and sales of a lunatic are only voidable. The other party is always bound, even if the contract is executory.²⁷ His purchase of personal necessities is absolutely binding, even though the seller knew his mental condition.²⁸ The modern tendency is to compel him to respond for goods furnished, although not necessities, if the seller acted in good faith and without reason to suspect insanity, and there has been no judicial declaration of insanity, and the seller cannot be restored to his original condition.²⁹ But the right to recover will be

^{26h} *Hayward v. Barker*, 52 Vt. 429; 36 Am. Rep. 762.

²⁶ⁱ *Mott v. Comstock*, 8 Wend. 544.

^{26j} *Crittenden v. Schermerhorn*, 39 Mich. 661; 33 Am. Rep. 440.

^{26k} *Hunt v. Hunt*, Vt. .

^{26l} *Cantine v. Phillips*, 5 Harring. 428.

²⁷ *Allen v. Berryhill*, 27 Iowa, 534; 1 Am. Rep. 309; *Allis v. Billings*, 6 Metc. 415; 39 Am. Dec. 744; *Ingraham v. Baldwin*, 9 N. Y. 45.

²⁸ *Sawyer v. Lufkin*, 56 Me. 308; *Blaisdell v. Holmes*, 48 Vt. 492; *Van Horn v. Hann*, 39 N. J. Law, 207.

²⁹ *Yong v. Stevens*, 48 N. H. 133; 97 Am. Dec. 592; *Fay v. Burditt*, 81 Ind. 433; 42 Am. Rep. 142; *Matthiessen Co. v. McMahon*, 38 N. J. Law, 536; *McCormick v. Littler*, 85 Ill. 62; 28

defeated if the seller had reasonable ground to suspect insanity.³⁰

Intoxicated Persons.—A purchase or sale by one not too much intoxicated to comprehend the transaction, is binding on him.³¹ But otherwise, although the intoxication was entirely voluntary and not in any way brought about by the other party, the transaction may be avoided by the person under the disability.³²

Factors.—By the English Factors' Act (6 Geo. IV., c. 94), it is provided that agents entrusted with evidences of title to personal property, like bills of lading, warehouse certificates, warrants, delivery orders, etc., "shall be deemed and taken to be the true owners of the goods so far as to give validity to sales" to buyers, without notice of the fact that such agents are not the real owners, and that purchasers from such agents are protected in their purchases, notwithstanding notice that the sellers are agents, provided purchase and payment are made in the usual and ordinary course of business, and without notice at the time of purchase and payment that the agent is not authorized to sell or receive payment.³³

Am. Rep. 610; *Abbott v. Creal*, 56 Iowa, 175; and see *Mut. L. Ins. Co. v. Hunt*, 79 N. Y. 541; *Lancaster Co. Bank v. Moore*, 78 Pa. St. 407; 21 Am. Rep. 24.

³⁰ *Lincoln v. Buckmaster*, 32 Vt. 652; *Alexander v. Haskins*, 68 Iowa, 73.

³¹ *Carpenter v. Rodgers*, 61 Mich. 384; 1 Am. St. Rep. 595.

³² *Barrett v. Buxton*, 2 Aik. 167; 16 Am. Dec. 691; *French v. French*, 8 Ohio, 214; 31 Am. Dec. 441; *Warnock v. Campbell*, 25 N. J. Eq. 485.

³³ *Benj. Sales*, § 21.

In many of the United States similar acts are in force, where shipment is made with the consent of the real owner in the name of another, or where the agent has not the documentary title, but is entrusted with the property itself on sale or as security.

It is held in England that this act applies only to persons who usually have the power of sale, such as factors and commission merchants, and not to others, such as wharfingers,³⁴ and the American acts are construed with similar strictness; the bailment must be for the purpose of sale, and the shipment must be made with the consent of the real owner in the name of another, and the act has no application where the property was wrongfully or fraudulently obtained from the owner.³⁵ The statute is limited to mercantile transactions in goods and merchandise, and does not embrace sales of furniture or goods in possession of a

³⁴ *Monk v. Whittenbury*, 2 B. & Ad. 484; *Jaulerry v. Britten*, 5 Scott, 656.

³⁵ *Stollenwerck v. Thacher*, 115 Mass. 224 (a broker); *First Nat. Bank of Toledo v. Shaw*, 61 N. Y. 283, 299; *Kinsey v. Leggett*, 71 N. Y. 389; (here it is said: "It is the consent of the owner in intrusting his goods to, and allowing a bill of lading in the name of another, thus conferring ostensible ownership and a right of control in the person named, which shields parties entirely innocent, who, on the faith of the evidence furnished, to which the owner has consented, and of which he has knowledge, have made advances on the property shipped. The act was not intended to deprive actual owners who had not parted with their title or who by fraud and without any fault on their part had lost control over it. This act has nothing to do with a case where property has been wrongfully taken from the possession of one, and then is fraudulently appropriated.") See *Mechanics', etc., Bank v. Farmers', etc., Bank*, 60 N. Y. 40; *Soltau v. Gerdau*, 119 N. Y. 380; 16 Am. St. Rep. 843; *Dows v. Nat. Ex. Bank*, 91 U. S. 618.

bailee for hire.³⁶ The agent must have the goods or the documentary evidence of title.³⁷ The mere power to *sell* does not embrace a power to *pledge*.³⁸ The factor may not transfer the goods in payment of his own antecedent debt, nor give any title thereby.³⁹ Unless prohibited expressly or by custom, he may sell on credit.⁴⁰ The factor's sale and delivery of the goods vest title as against one to whom the owner had previously sold, without order on or notice to the factor.⁴¹

³⁶ *Loeschman v. Machin*, 2 Stark. 276.

³⁷ *Soltan v. Gerdau*, *supra*; *Howland v. Woodruff*, 60 N. Y. 73.

³⁸ *DeWolf v. Gardner*, 12 Cush. 19; 59 Am. Dec. 165; *Ins. Co. v. Kiger*, 103 U. S. 352; *Gray v. Agnew*, 95 Ill. 315; *Laussatt v. Lippincott*, 6 S. & R. 386; 9 Am. Dec. 440; *Hazard v. Fisk*, 83 N. Y. 287; note, 58 Am. Dec. 165.

³⁹ *Warner v. Martin*, 11 How. 209.

⁴⁰ *Pinkham v. Crocker*, 77 Me. 563; *Goodenow v. Tyler*, 7 Mass. 36; 5 Am. Dec. 22.

⁴¹ *Jones v. Hodgkins*, 61 Me. 480.

CHAPTER III.

ASSENT.

To constitute a valid sale, there must be assent and agreement.¹ It need not be express, but it may be signified by a nod or gesture; or implied, as where one took up wares from a tradesman's counter and carried them away, nothing being said on either part; or where one receives and uses goods sent to him without order, knowing that he is expected to pay,^{1a} as for example, the very common case of one to whom a newspaper is sent regularly, and who does not stop it or notify the sender to discontinue it, but takes it in without objection and reads it. The assent must be mutual, contemporaneous, unconditional and precise, and communicated.

1. *Mutuality*.—An offer to sell or proposal to buy must be *accepted*, positively, definitely, and conclusively; so a bidder at auction may retract before the goods are struck off to him.² Merely naming a price

¹ Benj. Sales, § 46.

^{1a} Wellauer v. Fellows, 48 Wis. 105. See Moon v. Hawks, 2 Aik. 390; 16 Am. Dec. 725.

² Fisher v. Seltzer, 23 Pa. St. 308; 62 Am. Dec. 335.

in answer to an inquiry does not bind the seller to sell at that price.³

2. *Contemporaneousness*.—The offer and the acceptance must co-exist. So an offer may be retracted at any time before acceptance, although time is given to accept.⁴ And so the bargain may be closed by assent before the lapse of the time granted for that purpose.⁵

3. *Communication*.—(a) The assent must be communicated actually, or by legal implication.⁶ So mere uncommunicated preparations to act as if acceptance had been made do not make a binding assent.⁷ So where A. wrote to B., "Upon an agreement to fit up my office, No. 57 Broadway, in two weeks, you can begin at once." B., without replying, bought lumber and began work. A. not knowing it, countermanded

³ *Smith v. Gowdy*, 8 Allen, 566 ; *Moulton v. Kershaw*, 59 Wis. 316 ; 48 Am. Rep. 516 ; *Beaupré v. Pac., etc., Tel. Co.*, 21 Minn. 355. So where A. wrote B., offering salt at a stated price, without specifying quantity, and B. telegraphed, "You may ship me 2,000 bbls. Michigan fine salt as offered in your letter," held, not a binding contract. *Moulton v. Kershaw, supra*.

⁴ *Larmon v. Jordan*, 56 Ill. 204 ; *Eskridge v. Glover*, 5 Stew. & Port. 264 ; 26 Am. Dec. 344 ; *Faulkner v. Hebard*, 26 Vt. 452. So in *Eskridge v. Glover, supra*, G. offered to exchange horses with E. and pay \$50 boot ; E. reserved the right of deciding in two or three days ; the horses were actually exchanged ; but before E. decided or the time was out, G. notified E. that he withdrew ; held, no bargain, and that G. could recover the \$50.

⁵ *Boston & Me. R. Co. v. Bartlett*, 3 Cush. 224.

⁶ *Jenness v. Mt. Hope Iron Co.*, 53 Me. 20 ; *Emerson v. Graff*, 29 Pa. St. 358.

⁷ *Beckwith v. Cheever*, 21 N. H. 41.

the order. Held, no contract.⁸ (b) The acceptance must be communicated within the time if any, limited by the offer ; ⁹ or if none is specified, within a reasonable time.¹⁰ In like manner a retraction must be made known before it can take effect.¹¹

4. *Conditions.*—Assent must be unconditional, and precisely conform to the offer to be binding. So an offer to sell butter at 20 cents is not accepted by an agreement to take it, “if good.”¹² So where one ordered six hogsheads of rum, and only three were sent, which were lost in transit, held, no sale.¹³ So , where A. wrote B., on the 14th for flour, saying, , “Please write by return of wagon whether you accept our offer,” and B., accepted by mail on the 19th, addressed to A. at G., which A. received there, but had meantime bought all he wanted ; held, no sale.¹⁴ So an offer to sell at a certain time and place is not accepted by an answer naming a different time.¹⁵ So an offer to sell “ 2,000 to 5,000 tons,” is not accepted by a reply ordering 1,200.¹⁶ In general, no material

⁸ *White v. Corlies*, 46 N. Y. 467.

⁹ *Potts v. Whitehead*, 20 N. J. Eq. 55 ; *Curtis v. Blair*, 26 Miss. 309 ; 59 Am. Dec. 257 ; *Longworth v. Mitchell*, 26 Ohio St. 334.

¹⁰ *Loring v. Boston*, 7 Metc. 409 ; *Martin v. Black*, 21 Ala. 721 ; *Minn. Oil Co. v. Collier Lead Co.*, 4 Dill. 431 ; *Chicago, etc., R. Co. v. Dane*, 43 N. Y. 240. Reasonable time is a question of law. *Craft v. Isham*, 13 Conn. 41 ; *Loring v. Boston*, 7 Metc. 409.

¹¹ *Tayloe v. Merch. F. Ins. Co.*, 9 How. 390.

¹² *McIntosh v. Brill*, 20 Up. Can. C. P. 426.

¹³ *Bruce v. Pearson*, 3 Johns. 534.

¹⁴ *Eliason v. Henshaw*, 4 Wheat. 225.

¹⁵ *Johnson v. Stephenson*, 26 Mich. 63.

¹⁶ *Railway Co. v. Columbus Rolling Mill*, 119 U. S. 149.

condition may be added.¹⁷ And such a conditional or inexact acceptance forecloses a subsequent acceptance of the original offer.¹⁸

Sales by Letter.—At this point may be considered the much disputed matter of sales by letter. The rules as settled by the weight of authority may thus be expressed :

1. Where the offer is made by letter and is accepted by letter posted within a reasonable time, and before receipt of notice of withdrawal, the contract is complete, although the acceptance may be delayed or may not be received, owing to the fault of the post.¹⁹

2. If delivery of the letter of offer is delayed by

¹⁷ Carr v. Duval, 14 Peters, 77; Potts v. Whitehead, 23 N. J. Eq. 514; Hutcheson v. Blakeman, 3 Metc. (Ky.) 80; Eggleston v. Wagner, 46 Mich. 610; Robinson v. Weller, 81 Ga. 704; Myers v. Trescott, 59 Hun, 395; Maclay v. Harvey, 90 Ill. 525; 32 Am. Rep. 35; Sawyer v. Brossart, 67 Iowa, 678; 56 Am. Rep. 371; (as where "provided title is perfect").

¹⁸ Cartmel v. Newton, 79 Ind. 1; McCotter v. Mayor, 37 N. Y. 325; Baker v. Holt, 56 Wis. 100; Salomon v. Webster, 4 Colo. 353; Fulton Bros. v. U. C. Furn. Co., 9 Ont. App. 211.

¹⁹ Tayloe v. Merch. F. Ins. Co., 9 How. 390; Trevor v. Wood, 36 N. Y. 307; 93 Am. Dec. 511; Abbott v. Shepard, 48 N. H. 14; Hutcheson v. Blakeman, 3 Metc. (Ky.) 80; Hamilton v. Lycoming Ins. Co., 5 Barr, 339; Levy v. Cohen, 4 Ga. 1; Falls v. Gaither, 9 Port. 614; Averill v. Hedge, 12 Conn. 436; Wheat v. Cross, 31 Md. 99; 1 Am. Rep. 28; Potts v. Whitehead, 5 C. E. Green. 55; Washburn v. Fletcher, 42 Wis. 152; Note, 32 Am. Rep. 40; Kempner v. Cohn, 47 Ark. 519; 58 Am. Rep. 775. As to the English doctrine, "it is now settled, in Household Fire Insurance Company v. Grant, 4 Ex. Div. 216, that the parties are bound, from the moment the letter is put in course of transmission, by a contract, the existence of which is unaffected by the subsequent fate of the letter." Lawson Cont., § 21.

fault of the sender, the offer is extended until its arrival.²⁰

3. If undue delay or failure of delivery of the letter of acceptance is caused by the fault of the accepting party, there is no contract.²¹

4. The acceptance, by its terms, must be unconditional and in accordance with the terms of the offer, and within the time prescribed, if any, by the offer.²²

5. An immaterial addition to the acceptance does not prevent the contract from taking effect.²³

6. Acceptance must be within a reasonable time, unless a time is limited in the offer.²⁴

7. Offer may be withdrawn before acceptance.²⁵

²⁰ *Mactier v. Frith*, 6 Wend. 103; *Averill v. Hedge*, 12 Conn. 436.

²¹ *Thayer v. Middlesex F. Ins. Co.*, 10 Pick. 326; *Bryant v. Booze*, 55 Ga. 438.

²² *Jenness v. Mt. Hope Ins. Co.*, 53 Me. 20; *Bruce v. Pearson*, 3 Johns. 534; *Eliason v. Henshaw*, 4 Wheat. 225; *Chic., etc., R. Co. v. Dane*, 43 N. Y. 240; *Baker v. Johnson Co.*, 37 Iowa, 189; so where the offer called for reply by return mail, compliance was held essential; *Maclay v. Harvey*, 90 Ill. 525; 32 Am. Rep. 35; *Sawyer v. Brossart*, 67 Iowa, 678; 56 Am. Rep. 371. Where an offer by telegraph to sell goods is answered by an offer to buy at a certain price, with the additional condition, "Must have reply early to-morrow," this is a stipulation for a reply within that time; and where it is not received until late in the evening of that day, in the absence of proof that the condition was complied with, the contract is not complete, and the title will not pass as against an attachment levied on that day before the reply was received. *Union Nat. Bank v. Miller*, 106 N. C. 347; 19 Am. St. Rep. 538. To the same effect, *Atlee v. Bartholomew*, 69 Wis. 43; 5 Am. St. Rep. 103.

²³ Note, 48 Am. Rep. 51.

²⁴ *Ferrier v. Storer*, 63 Iowa, 484; 50 Am. Rep. 752. Next day will answer; *Dunlop v. Higgins*, 1 H. L. Cas. 381; but four months will not; *Chic., etc., R. Co. v. Dane*, 43 N. Y. 240.

²⁵ *Eskridge v. Glover*, 5 Stew. & Port. 264; 26 Am. Dec. 344; *Faulkner v. Hebard*, 26 Vt. 452; *Beckwith v. Cheever*, 21 N. H. 41; *Burton v. Shotwell*, 13 Bush, 271.

8. Acceptance may be withdrawn before or at receipt.²⁶

9. Withdrawal of offer after acceptance is duly posted is inoperative.²⁷

10. If a letter of acceptance and a subsequently written letter of retraction are received at the same moment, there is no contract.^{27a}

The rules as to acceptance by letter apply to acceptance by telegraph; the bargain is complete when the message is deposited at the telegraph office for transmission.²⁸

²⁶ *Dunmore v. Alexander*, 9 Shaw & Dun. 190. But Story says (Cont., § 408): "The person accepting cannot therefore even stop his letter on the road after it is once mailed."

²⁷ *Byrne v. Van Tienhoven*, 5 C. P. Div. 344; 42 L. T. Rep. (N.S.) 371. *McCulloch v. Eagle Ins. Co.*, 1 Pick. 283, holding that a retraction of an offer, not then accepted, takes effect from the time it was posted, although not received by the other party until after he had mailed an acceptance, and so no contract existed, because at the moment the acceptance was sent the mind of the party offering had changed, and he had mailed his retraction, is generally discredited in this country, and is inconsistent with cases cited under reference 5, *supra*. Mr. Benjamin (*Sales*, § 65, note 7), cites this, and *Hallock v. Com. Ins. Co.*, 2 Dutcher, 268, as impugning the authority of *Cooke v. Oxley*, 3 T. R. 653, which is generally accepted by the courts in this country, although it is attacked by Story, Kent, and Duer. Mr. Bennett plaintively says (*Benj. Sales*, 6th Am. Ed., note, p. 76): "If the prevailing doctrine applies to every contract by letter, it seems to follow that a proposal of marriage by letter is duly accepted and the contract closed when the acceptance is duly mailed; and if the proposer marry another because he never received the letter of acceptance of his first offer, he is liable at once to a suit for a breach of promise!" Why not? He should have been "sure he was off with the old love before he was on with the new."

^{27a} *Dunmore v. Alexander*, 9 Shaw & Dun. (Scotch), 190.

²⁸ *Trevor v. Wood*, 36 N. Y. 307; 93 Am. Dec. 511; *Perry v. Mt. Hope Iron Co.*, 15 R. I. 380; 2 Am. St. Rep. 502; *Minn. L. O.*

Acceptance of Part.—In case of acceptance of part of an entire lot of goods ordered, after or with knowl-

Co. v. Collier Lead Co., 4 Dill. 431. The leading English cases on the interesting topic of contract by letter are *Dunlop v. Higgins*, 1 H. L. Cas. 381; *Adams v. Lindsell*, 1 B. & Ald. 681; and *Household F. Ins. Co. v. Grant*, 4 Ex. Div. 216, holding the doctrine of the first rule of the text above, and disagreeing with the doctrine of *Reidpath's case*, L. R. 11 Eq. 86; *Brit., etc., Tel. Co. v. Colson*, L. R. 6 Ex. 108; *Harris' Case*, L. R. 7 Ch. 587. In *Brogden v. Met. Ry. Co.*, 2 App. Cas. 666, Lord Blackburn bases the matter on the ground that "the acceptor has by an extraneous act (that of posting the letter) put it (the acceptance) out of his control." To this Mr. L. C. Innes replies (9 Law Quart. Rev. 318-320) :

"But is this so? Suppose that A. and B. instead of being 100 miles apart are in a room together, A. being stone deaf. A. has made his offer, and B., not being able to make A. hear, decides to communicate with him in writing. He writes his answer accepting, and proceeds to hand it to A.; but suddenly, entertaining doubts about the matter, he withdraws his hand which was approaching A., and writes another note, which he then hands to A., refusing the offer. The contract is clearly not made. There was no communication of acceptance.

"Suppose again that the parties were at a distance in places devoid of postal communication, and B. despatched his own messenger with a letter of acceptance; and that, some time afterwards, changing his mind, he sent another man to recall his messenger. It can scarcely be contended that the contract was complete by the despatch of the first messenger, and that B. could not recall his acceptance by sending a second messenger to recall the first, before delivery of his despatch to A.

"But suppose there were two ways of getting to A., and that B. did not know by which route his messenger had gone, and could not therefore depend on his second messenger coming up with the first and being able to recall him. He would then, we will suppose, write off to A. refusing the offer, and send the second messenger with all speed with instructions to reach A. as soon as possible and deliver the note to him, and prevent the first messenger from delivering his message.

"Assuming that the second messenger was able to forestall the first in the delivery of his note to A., it will be admitted that there would be no complete contract. Now suppose B., instead of sending a private messenger, employs the post-office. We will take it

edge that the remainder will not be furnished, it is generally held that the purchaser is liable to respond *pro rata*, although some courts allow a counter-claim for damages for non-completion.²⁹ But if the pur-

for the sake of argument that the post-office is *his agent alone* for the purpose of transmitting the acceptance. By the rules of the post-office a letter once posted cannot be recalled, but its arrival at its destination can be forestalled by a telegraphic despatch. He employs the telegraph for this purpose, and revokes the acceptance sent by the post.

"Here, then, assuming as before that both the telegraph and post are the agents in this matter of *B. alone*, it is quite clear that there is no communication with A. until the arrival of the second message recalling the first, and there is no completed contract.

"In such circumstances the extraneous act of posting the letter has not put the acceptance beyond the acceptor's control.

"If, however, we regard the post-office as *the agent of the offerer as well as of the acceptor*, the moment of despatch is also the moment of communication to the extended personality of A., and the contract is at once completed. There is no room for revocation.

"If, however, we regard the post as impliedly authorized by the offerer to *receive the return message*, in all cases in which by the general usages of mankind the post would be the means of communication, then the offerer extends his personality through the post, as his agent for the reception of the acceptance or refusal of the offer, and there is a communication with him through this his extended personality at the moment of posting. If the communication does not reach him, that is an affair between him and his extended personality, and does not affect the completeness of the contract at the moment of the posting of the acceptance. It is as though the acceptor, being on the spot, had chosen to deliver personally to the offerer his written acceptance, and the offerer had personally received into his hand from the acceptor the note containing the acceptance, but had dropped and lost it before he had had an opportunity of reading it. Nevertheless the acceptance having been signified to the offerer the contract is complete."

²⁹ Oxendale v. Wetherell, 9 B. & C. 586; Bowker v. Hoyt, 18 Pick. 558; Richards v. Shaw, 67 Ill. 225; Flanders v. Putney, 58 N. H. 358; Harralson v. Stein, 50 Ala. 347; Sentell v. Mitchell, 28 Ga. 196; Goodwin v. Merrill, 13 Wis. 658; Booth v. Tyson, 15 Vt. 518; Shaw v. Badger, 12 Serg. and R. 275;

chaser requests delivery of part before any are delivered, this may amount to a waiver of his right to insist on the whole as a condition precedent.³⁰

Sale by Suit.—A satisfied judgment in trover transfers title to the property to the defendant.³¹ It has also been held that in case of a tortious taking and conversion the owner may waive the tort and recover the value ;³² but other courts hold that this may not be done unless the property has been converted into money.³³

Mistake.—There can be no binding assent if there has been a material mistake as to the person dealt with or the existence, identity, species or kind of the subject matter, or as to the price.³⁴ As where at auction one

Ruiz v. Norton, 4 Cal. 355 ; 60 Am. Dec. 618 ; Churchill v. Holton, 38 Minn. 519. In Kein v. Tupper, 52 N. Y. 555, however, the court say that "The English rule, that a recovery may be had for the portion delivered, if retained until after the time for full performance (as held in 9 B. & C. 387, and other cases), has never been adopted, but expressly repudiated by the courts of the State ;" citing Champlin v. Rowley, 13 Wend. 259 ; Baker v. Higgins, 21 N. Y. 397 ; Norton v. Woodruff, 2 N. Y. 153. "That rule rests upon no solid foundation, and in effect enables courts to alter the terms of contracts as made by parties." See also Witherow v. Witherow, 16 Ohio, 238.

³⁰ Avery v. Willson, 81 N. Y. 341 ; 37 Am. Rep. 503.

³¹ Hepburn v. Sewell, 5 H & J. 211 ; 9 Am. Dec. 512 ; Lovejoy v. Murray, 3 Wall. 16 ; Brady v. Whitney, 24 Mich. 154 ; Fox v. Prickett, 34 N. J. L. 15 ; White v. Philbrick, 5 Greenl. 152 ; 17 Am. Dec. 214. The doctrine that title passes on mere recovery of the judgment without satisfaction (Marsh v. Pier, 4 Rawle, 287 ; 26 Am. Dec. 131), seems unsound. See Benj. Sales, § 48.

³² Terry v. Munger, 121 N. Y. 161 ; 18 Am. St. Rep. 803.

³³ Jones v. Hoar, 5 Pick. 285.

³⁴ Harvey v. Harris, 112 Mass. 32 ; Gibson v. Pelkie, 37 Mich.

bids off one lot supposing it to be another ;³⁵ or the buyer understands the price as \$65 when it was \$165 ;³⁶ or paid a \$10 piece supposing it was fifty cents.³⁷ Thus in *Boston Ice Co. v. Potter*, 123 Mass. 28; 25 Am. Rep. 9, defendant had bought ice from plaintiff, but became dissatisfied and contracted to buy of the C. Ice Company ; plaintiff bought out that company's business, and delivered ice to defendant without notifying him of the purchase of that business until after the ice had been delivered and consumed. Held, that defendant was not liable for the price of the ice. In like manner title will not pass to goods not intended to be sold or bought ; as in the case of valuables concealed in a piece of furniture sold.³⁸

But a mistake as to the quantity, quality, or fitness for some undisclosed purpose, in absence of warranty, does not avoid the sale.³⁹ As a mistake in regard to the solvency of the parties to a note sold.⁴⁰

380; *Decan v. Shipper*, 35 Pa. St. 239; 78 Am. Dec. 334; *Allen v. Hammond*, 11 Peters, 63; *Hartford, etc., R. Co. v. Jackson*, 24 Conn. 514; 63 Am. Dec. 177; *Rovegno v. Defferari*, 40 Cal. 459; *Ketcham v. Catlin*, 21 Vt. 191; *Webb v. Odell*, 49 N. Y. 585; *Byers v. Chapin*, 28 Ohio St. 300; *Schaeffer v. Bond*, 70 Md. 482.

³⁵ *Sheldon v. Capron*, 3 R. I. 171.

³⁶ *Rupley v. Daggett*, 74 Ill. 352.

³⁷ *Chapman v. Cole*, 12 Gray, 141; 71 Am. Dec. 739.

³⁸ *Huthmacker v. Haines*, 38 Pa. St. 491; 80 Am. Dec. 502; *Livermore v. White*, 74 Me. 452; 43 Am. Rep. 600; *Durfee v. Jones*, 11 R. I. 588; 23 Am. Rep. 528; *Ray v. Light*, 34 Ark. 421; *Bowen v. Sullivan*, 62 Ind. 281; *Hogue v. Mackey*, 44 Kans. 277. Some of these cases were in respect to lost property, but the principle is the same.

³⁹ *Williams v. Hathaway*, 19 Pick. 387; *Smith v. Ware*, 13 Johns. 257; *Wheat v. Cross*, 31 Md. 99; 1 Am. Rep. 28.

⁴⁰ *Hecht v. Batcheller*, 147 Mass. 335; 9 Am. St. Rep. 708.

So where one supposes he is selling to an agent but really sells to a principal who afterward sells to the supposed principal, this is not a case of mistaken identity, and the goods cannot be recovered from the second purchaser.⁴¹ If A. fraudulently assumes the name of B. and E. sells him goods personally, the sale is only voidable.⁴² But if A. falsely represents himself as the brother of a certain reputable merchant and buying for him, the vendor intending to sell only to the alleged principal, there is no sale.⁴³

Uncertainty.—There is no binding assent if the contract of sale is unintelligible.⁴⁴

⁴¹ *Stoddard v. Ham*, 129 Mass. 383; 37 Am. Rep. 369.

⁴² *Edmunds v. Merch. Trans. Co.*, 135 Mass. 283.

⁴³ *Aborn v. Merch. Trans. Co.*, 135 Mass. 283; *Barker v. Dinsmore*, 72 Pa. St. 427; 13 Am. Rep. 697; *Hamett v. Letcher*, 37 Ohio St. 356; *McCrillis v. Allen*, 57 Vt. 505; *Randolph Iron Co. v. Elliott*, 34 N. J. L. 184.

⁴⁴ *Whelan v. Sullivan*, 102 Mass. 204; *Cummer v. Butts*, 40 Mich. 322; 29 Am. Rep. 530, (where the contract provided for cancellation "for good cause"); *Buckmaster v. Consumers' Ice Co.*, 5 Daly, 313 (where the language was "net profit not to exceed one dollar per ton.")

CHAPTER IV.

THE SUBJECT OF SALE.

THE thing sold must be in existence at the time of the sale, or it must be bargained for so as to come into existence as the natural product or expected increase of something already belonging to the seller. So if the thing sold has been in existence but has ceased to exist before or at the time of the sale, the sale is void because performance is impossible.¹

At law one cannot bind himself by a sale of what he does not then own, but which he expects to acquire and afterwards does acquire ; as for example, a take of fish.²

¹ *Benj. Sales*, 77; *Dexter v. Norton*, 47 N. Y. 62; 7 Am. Rep. 415; *Wells v. Calnan*, 107 Mass. 514; *Greene v. Linton*, 7 Port. 133; 31 Am. Dec. 707; *The Tornado*, 108 U. S. 342; *Powell v. R. Co.*, 12 Oreg. 488; *Ward v. Vance*, 93 Pa. St. 499; *Gould v. Murch*, 70 Me. 288. Some of these cases are in regard to contracts of service, but the principle is analogous. See *Young v. Bruce*, 5 Litt. 324; *Harris v. Nicholas*, 5 Munf. 483.

² *Low v. Pew*, 108 Mass. 347; 11 Am. Rep. 357; *Jones v. Richardson*, 10 Metc. 481; *Head v. Goodwin*, 37 Me. 182; *Williams v. Briggs*, 11 R. I. 176; 23 Am. Rep. 518; *Gittings v. Nelson*, 86 Ill. 591; *Hunter v. Bosworth*, 43 Wis. 583; *Parker v. Jacobs*, 14 S. C. 112; 37 Am. Rep. 724. *Contra* : *Frazer v. Hilliard*, 2 Strobh. 309, especially as between the parties, *Deering v. Cobb*, 74 Me. 332; 43 Am. Rep. 596. The same is true of a sale of an expected interest in an estate. *Needles v. Needles*, 7 Ohio St. 433; 70 Am. Dec. 85. Most of these cases discuss the question of power to mortgage,

In equity however the subsequently acquired title works a binding sale as between the parties.³

but the principle is the same. In *Low v. Pew*, the holding was that a sale of fish hereafter to be caught passes no title to the fish when caught. This is put on the ground that the fisher has no property in the fish until caught, the court observing: "It is equally well settled that it is sufficient if the seller has a potential interest in the thing sold. But a mere possibility or expectancy of acquiring property, not coupled with any interest, does not constitute a potential interest in it, within the meaning of this rule. The seller must have a present interest in the property, of which the thing sold is the product, growth, or increase. Having such interest, the right to the thing sold, when it shall come into existence, is a present vested right, and the sale of it is valid. Thus a man may sell the wool to grow upon his own sheep, but not upon the sheep of another; or the crops to grow upon his own land, but not upon land in which he has no interest. 2 Kent. Com. (10th ed.) 468 (641), note *a*; *Jones v. Richardson*, 10 Metc. 481; *Bellows v. Wells*, 36 Vt. 599; *Van Hoozer v. Cory*, 34 Barb. 9; *Grantham v. Hawley*, Hob. 132." See *Parker v. Jacobs*, 14 S. C. 112; 37 Am. Rep. 724. The attempt to sell in such cases seems as ineffectual to pass title as the proposal of the Adversary to the Saviour on the mountain to give him all "the kingdoms of the world."

³ *Holroyd v. Marshall*, 10 H. L. Cas. 191; *Mitchell v. Winslow*, 2 Story, 630; *Brett v. Carter*, 2 Low. 458; *Pennock v. Coe*, 23 How. 117; *Morrill v. Noyes*, 56 Me. 458; 96 Am. Dec. 486; *Phila.*, etc., Co. v. *Woelpper*, 64 Pa. St. 366; 3 Am. Rep. 596; *Phillips v. Winslow*, 18 B. Monr. 431; 68 Am. Dec. 729; *Sillers v. Lester*, 48 Miss. 513; *Pierce v. Milwaukee*, etc., R. Co., 24 Wis. 551; 1 Am. Rep. 203; *Smithurst v. Edmunds*, 14 N. J. Eq. 408; *McCaffrey v. Woodin*, 65 N. Y. 459; 22 Am. Rep. 644; *Williams v. Winsor*, 12 R. I. 9; *Butt v. Ellett*, 19 Wall. 544; *Apperson v. Moore*, 30 Ark. 56; 21 Am. Rep. 170. But *contra*: *Phelps v. Murray*, 2 Tenn. Ch. 746; *Hunter v. Bosworth*, 43 Wis. 583; *Blanchard v. Cooke*, 144 Mass. 225. "It is now established, upon indisputable authority, that a contract for the sale and future delivery of a commodity of a designated kind or class, which the seller does not own, and which was at the time in actual existence, but which may be supplied by purchase in the market at the proper time, is a valid contract, provided it is the intention of the parties, or of one of them, at the time the contract is made, that the commodity shall actually be procured by the seller, and supplied to the purchaser

As to the potential existence of the natural product or increase of something already belonging to the vendor, this is the proper subject of a sale, and the purchaser may take the property when it comes into existence. As the unborn young of animals, during or even before gestation.⁴ So of a crop then sown or growing on the seller's land,⁵ or even to be planted or grown thereon.⁶

at or before the maturity of the agreement. *Cobb v. Prell*, 15 Fed. Rep. 774; 22 Am. Law. Reg. N. S. 609, and note; *Crawford v. Spencer*, 92 Mo. 498; 1 Am. St. Rep. 745, and note." *Sondheim v. Gilbert*, 117 Ind. 71; 10 Am. St. Rep. 23. Benjamin says: (Sales, § 83): "In America it has been decided, that if a vendor sell a thing not belonging to him, and subsequently acquires a title to it, before the repudiation of the contract by the purchaser, the property in the thing sold vests immediately in the purchaser;" citing *Frazer v. Hilliard*, 2 Strobb. 309; *Blackmore v. Shelby*, 8 Humph. 439; *Hotchkiss v. Oliver*, 5 Denio, 314. "But the prevailing American doctrine on this subject," he continues, "seems to be essentially the same as the English one;" citing *Story on Sales*, § 186, and notes.

⁴ *Hull v. Hull*, 48 Conn. 250; *McCarty v. Blevins*, 5 Yerg. 195; 26 Am. Dec. 262; *Fonville v. Casey*, 1 Murphey, 389; 4 Am. Dec. 559; *Sawyer v. Gerrish*, 70 Me. 254; 25 Am. Rep. 323.

⁵ *Cotten v. Willoughby*, 83 N. C. 75; 35 Am. Rep. 564; *Stephens v. Tucker*, 55 Ga. 543; *Sanborn v. Benedict*, 78 Ill. 309; *Wilkinson v. Ketler*, 69 Ala. 435.

⁶ *Andrews v. Newcomb*, 32 N. Y. 417; *Rawlings v. Hunt*, 90 N. C. 270; *Hurst v. Bell*, 72 Ala. 336; *Watkins v. Wyatt*, 9 Baxt. 250; 40 Am. Rep. 90; *Everman v. Robb*, 52 Miss. 653; 24 Am. Rep. 682; *Heald v. Builders' Ins. Co.*, 111 Mass. 38; *Smith v. Atkins*, 18 Vt. 461; *Cutting Packing Co. v. Packers' Exchange*, 86 Cal. 574; 21 Am. St. Rep. 63; *Arques v. Wasson*, 51 Cal. 620; 21 Am. Rep. 718; *Headrick v. Brattain*, 63 Ind. 438; *Moore v. Byrum*, 10 S. C. 452; 30 Am. Rep. 58; *Conderman v. Smith*, 41 Barb. 404, "the butter and cheese to be made this season;" *Van Hoozer v. Cory*, 34 Barb. 9, an admirable treatment of the topic. But *contra*: *Hutchinson v. Ford*, 9 Bush, 318; 15 Am. Rep. 711; mortgage by lessor of crop to be raised, but not yet sown, on the leased land; *Collier v. Faulk*, 69 Ala. 58; *Redd v. Burrus*, 58 Ga. 574; *Com-*

But in cases of attempted sale, where no title presently passes, but where the seller can subsequently acquire it, an action of damages for the breach lies,⁷ unless the contract was simply a wager.

Some things are the proper subject of sale although they have no corporeal existence, as, for example, the good will of a partnership,⁸ a newspaper subscription stock *v. Scales*, 7 Wis. 159; *Gittings v. Nelson*, 86 Ill. 591; *Shaw v. Gilmore*, 81 Me. 396. In *Hutchinson v. Ford*, *supra*, the court say: "When the crop is growing, although not matured, it may be sold or mortgaged; but when the fruit is to be obtained from the tree that is hereafter to blossom and form it, or the grain to be grown on ground thereafter to be sown, it is difficult to conceive how such an existence can be given it as to make it the subject of an executed contract, by which the title passes to the purchaser. Agreements to sell may be made with reference to such potential interests, but no such agreement as would vest the party buying with any title." The precise contrary is explicitly held in *Watkins v. Wyatt* and *Moore v. Byrum*, *supra*. In the former the court say: "The question presented is, whether a crop of cotton yet to be planted is the subject of a valid mortgage; and the adjudged cases seem to be very much in conflict on the subject. A humane policy would seem to favor the affirmative of the proposition, as if such is the law, the indigent farmer may obtain credit upon his prospects, and be enabled to subsist his family pending the cultivation of his crop. The crop has a potential existence because it was to be the natural product and expected increase of the land then owned by him." It is admitted that if the seed is sown the sower may sell or mortgage the crop the next moment. It really seems a foolish distinction to say that ownership and power to confer title depend on some motions of the seller's hand and the fall of seed upon the earth. Undoubtedly one could sell the wool to grow on his sheep instantly after shearing and before the new clip had begun to grow, and there is no just difference between the cases. In *Hull v. Hull*, 48 Conn. 250; 40 Am. Rep. 165, this doctrine was held concerning colts to be foaled, and very similar is *Sawyer v. Gerrish*, 70 Me. 254; 25 Am. Rep. 323.

⁷ *Hibblewhite v. McMorine*, 5 M. & W. 462; *Clarke v. Foss*, 7 Biss. 541; *Phillips v. Ocmulgee Mills*, 55 Ga. 633; *Appleman v. Fisher*, 34 Md. 551; *Blackwood v. Cutting, etc., Co.*, 76 Cal. 212.

⁸ *Barber v. Conn. M. L. Ins. Co.*, 15 Fed. Rep. 312; *Brass and Iron Works Co. v. Payne* (Ohio), 19 Lawy. Rep. Ann. 82.

list,⁹ a newspaper carrier's route,¹⁰ a seat in a stock exchange,^{10a} an annuity,¹¹ a license to sell a patented or copyrighted article,¹² a ferry franchise,¹³ a trademark,¹⁴ State land scrip,¹⁵ a mining privilege,¹⁶ knowledge of the existence and locality of an oil well.¹⁷

⁹ *McFarland v. Stewart*, 2 Watts, 111; 26 Am. Dec. 109.

¹⁰ *Hathaway v. Bennett*, 10 N. Y. 108; 61 Am. Dec. 739.

^{10a} *Clute v. Loveland*, 68 Cal. 254; *Powell v. Waldron*, 89 N. Y. 328; 42 Am. Rep. 301, and note, 302. *Contra* as to a board of trade in which membership is untransferable; *Barclay v. Smith*, 107 Ill. 349; 47 Am. Rep. 437.

¹¹ *Lloyd v. Scott*, 4 Pet. 205.

¹² *Brooks v. Byam*, 2 Story, 525; *Pepper v. Labrot*, 8 Fed. Rep. 29.

¹³ *Montgomery v. Multnomah R. Co.*, 11 Oreg. 344.

¹⁴ *Warren v. Warren Thread Co.*, 134 Mass. 247.

¹⁵ *Yonley v. Thompson*, 30 Ark. 399.

¹⁶ *Johnston v. Cowan*, 59 Pa. St. 280.

¹⁷ *Reed v. Golden*, 28 Kans. 632; 42 Am. Rep. 180. "One who knows the locality of oil wells, of mines, or of other valuable properties, may sell his knowledge to any one willing to buy, and the disclosure of the locality of such properties is a sufficient consideration for the purchaser's promise to pay." Just as a teacher may sell his knowledge of Greek, or as Mr. Ignatius Donnelly may sell, if he can, his knowledge of the Baconian cypher concealed in Shakespeare's works.

CHAPTER V.

THE PRICE.

THE price must be in money, to be paid presently or in the future. As has been seen, in a certain class of cases where a transaction is deemed a sale rather than a bailment, as where a miller takes grain and agrees to give flour for it, the price is not in money, but in merchandise; and thus in strictness it would seem a case of barter; but still the law calls it a sale. It may be expressly agreed on or be left to implication. It may be agreed on directly by the parties, or they may agree that it shall be fixed by others, or shall be dependent on circumstances.

In case no price is fixed, the intendment of law is that it shall be a reasonable price.¹ This is usually the ruling market price at the time and place of delivery.² But not so if that price is unreasonable, as where the market is inflated unnaturally.³ Or where there is a general combination of dealers to enhance the price.⁴

¹ Taft v. Travis, 136 Mass. 95; James v. Muir, 33 Mich. 223; McEwen v. Morey, 60 Ill. 32; Shealy v. Edwards, 73 Ala. 175; 49 Am. Rep. 43.

² McEwen v. Morey, 60 Ill. 32.

³ Kountz v. Kirkpatrick, 72 Pa. St. 376; 13 Am. Rep. 687.

⁴ Lovejoy v. Michels, 88 Mich. 15.

The price may be indirectly fixed, as by reference to prices that may prevail at some other time. Thus, "ten cents a bushel less than the Milwaukee price on any future day the vendor may name,"⁵ or by reference to a subsequent auction price;⁶ or "the highest market price whenever the vendor may demand payment;"⁷ or for "a reasonable price to be agreed on afterwards."⁸ But there must be some agreed standard for fixing the price. So if a sale is made *provided* the parties shall afterward agree on the price, but they do not agree, there is no sale,⁹ especially where there is no delivery.¹⁰

The parties may leave the determination of the price to third persons;¹¹ and generally this postpones the vesting of title until the price is so fixed,¹² unless the purchaser himself prevents such determination.¹³

Agreed postponement of payment of the price does not invalidate the sale; there may be a definite term of credit, or even an agreement that payment need not be made until after re-sale,¹⁴ and in the latter case

⁵ *McConnell v. Hughes*, 29 Wis. 537.

⁶ *Cunningham v. Brown*, 44 Wis. 72.

⁷ *McBride v. Silverthorne*, 11 U. C. Q. B., 545.

⁸ *Greene v. Lewis*, 85 Ala. 225; 7 Am. St. Rep. 42; and if the parties do not so agree the sale is not defeated, but the price will be fixed at a reasonable amount.

⁹ *Wittkowsky v. Wasson*, 71 N. C. 451.

¹⁰ *Bigley v. Risher*, 63 Pa. St. 153.

¹¹ *Brown v. Bellows*, 4 Pick. 189; *Norton v. Gale*, 95 Ill. 533.

¹² *Fuller v. Bean*, 34 N. H. 290; *Hutton v. Moore*, 26 Ark. 382.

¹³ *Humaston v. Am. Tel. Co.*, 20 Wall. 20.

¹⁴ *Blow v. Spear*, 43 Mo. 496; 97 Am. Dec. 412.

if the property is not returned in a reasonable time a re-sale will be presumed.¹⁵

¹⁵ Ibid.; *McArthur v. Wilder*, 3 Barb. 66 (resale of three barrels of white fish presumed in three years and a half—which, considering the nature of the commodity, seems quite reasonable, as it must have taken on “an ancient and a fish-like smell” much short of that period).

PART II.

SALES AS AFFECTED BY STATUTES.

UNDER THE STATUTE OF FRAUDS.

CHAPTER I.

CONTRACTS WITHIN THE STATUTE.

THE English Statute of Frauds (29 Chas. II., c. 3) has been generally re-enacted in the United States with but slight variations. The statute in this country is usually to the effect that no contract for the sale of goods, wares and merchandise to the amount of \$50 or more (the amount varies) shall be valid unless at the time of the contract the goods or part of them are accepted and delivered, or the price or part of it is paid, or a written memorandum of the transaction is signed.

It is generally considered that the statute extends to agreements for future delivery.¹

It must be observed that the statute applies only to

¹ *Jackson v. Covert*, 5 Wend. 139; *Hight v. Ripley*, 19 Me. 137; *Ide v. Stanton*, 16 Vt. 585; 11 Am. Dec. 698; *Edwards v. Grand Trunk Ry. Co.*, 48 Me. 379; *Atwater v. Hough*, 29 Conn. 513; 79 Am. Dec. 239; *Finney v. Apgar*, 31 N. S. L. 270.

sales. But very fine distinctions have been raised and radical differences of judicial opinion have been expressed as to what constitutes a contract of sale and what is a contract for manufacture or for work on new materials. This difference is most strongly marked between Massachusetts and New York as the leading States. Thus where a carriage builder had several unfinished buggies on hand, and the purchaser selected one to be finished, this was held not a sale, but a contract for manufacture, and not within the statute.² But it is otherwise if the article ordered is exactly such as the plaintiff ordinarily keeps on sale, and there is to be no change or addition although it is not in existence at the time. So where one ordered of a manufacturer 100 boxes of candles at 26 cents a pound, and the manufacturer had them not on hand but agreed to make and deliver them in the course of the summer, this was held a sale.³ The Massachusetts rule was expressed by Chief Justice SHAW thus: "When a person stipulates for the future sale of articles which he is habitually making, and which at the time, are not made or finished, it is essentially a contract of sale and not a contract of labor; otherwise when the article is made pursuant to the agreement."⁴ Mr. Benjamin says, this "rests on no satis-

² *Mixer v. Hawarth*, 21 Peck, 205; 32 Am. Dec. 256; followed in a more obvious case, *Goddard v. Binney*, 115 Mass. 450; 15 Am. Rep. 112.

³ *Gardner v. Joy*, 9 Metc. 177; *Goddard v. Binney*, 115 Mass. 450; 15 Am. Rep. 112.

⁴ *Lamb v. Crafts*, 12 Metc. 353.

factory principle." The Massachusetts rule however is adopted in Maine, New Hampshire, Vermont, Connecticut, New Jersey, Wisconsin, Georgia, Minnesota, Nevada, South Carolina and Missouri.⁵

⁵ *Hight v. Ripley*, 19 Me. 137; *Edwards v. Grand Trunk Ry.*, 48 Me. 379; 54 Id. 105; *Pitkin v. Noyes*, 48 N. H. 294; 97 Am. Dec. 615; *Prescott v. Locke*, 51 N. H. 94; 12 Am. Rep. 55; *Ellison v. Brigham*, 38 Vt. 64; *Atwater v. Hough*, 29 Conn. 509; 79 Am. Dec. 299; *Finney v. Apgar*, 31 N. J. L. 171; *O'Brien v. Frasier*, 47 N. J. L. 349; 54 Am. Rep. 170; *Pawleski v. Hargreaves*, 47 N. J. L. 334; 54 Am. Rep. 162; *Hardell v. McClue*, 1 Chand. 271; *Meinck v. Falk*, 55 Wis. 427; 42 Am. Rep. 722; *Phillips v. McFarlane*, 3 Minn. 109; 74 Am. Dec. 743; *O'Neill v. N. Y., etc., Co.*, 3 Nev. 141; *Bird v. Muhlinbrink*, 1 Rich. L. 199; 44 Am. Dec. 247; *Gadsden v. Lane*, 1 McM. Eq. 87; 37 Am. Dec. 548; *Carson v. Cheely*, 6 G. 54; *Pratt v. Miller*, 109 Mo. 78; 32 Am. St. Rep. 656. Under the Iowa statute, which is substantially like the English statute, and provides that the statute does not apply when the property sold is owned by the vendor and ready for delivery, but labor, skill and money are necessarily to be expended in producing or procuring the same, it is held that a sale of a crop of growing grain, raising by the seller and to be delivered in marketable condition, is within the statute, the court reviewing the principal authorities above cited, and saying: "the defendant expended no work, labor, skill or money on the oats other than he would have done if there had been no contract of sale." *Mighell v. Dougherty*, Iowa, ; 17 Lawy. Am. Rep. 755. In *Pratt v. Miller*, *supra*, the rule is thus expressed: "Where the contract is for articles coming under the general denomination of goods, wares and merchandise, the vendor being at the time a manufacturer and a dealer in them as a merchant, or so dealing has them manufactured for his trade, by others; and the vendee being also a merchant dealing in and purchasing the same line of goods for his trade, of which fact the vendor is aware; the quantity required and the price being agreed upon, and the goods contracted for being of the same general line which the vendor manufactures or has"—*i. e.* procures to be—"manufactured for his general trade as a merchant, requiring the bestowal of no peculiar care or personal skill, or the use of material or a plan of construction different from that obtaining in the ordinary production of such manufactured goods for the vendor's general stock in trade, the contract is one of sale, and within the statute of frauds, although the

The New York rule, on the other hand may be expressed thus : A contract to make an article to order wholly out of raw materials, although not after a particular pattern furnished by the buyer, but similar to those which the vendor habitually makes and keeps on sale, is a contract of manufacture and not of sale ; ⁶ but if the article is already substantially made

goods are not *in solido* at the time of the contract, but are to be thereafter made and delivered." In *Pawleski v. Hargreaves*, 47 N. J. L. 334; 54 Am. Rep. 162, defendants went to the shop of the plaintiff, a wagon and carriage maker, to purchase brewery trucks. Plaintiff having none on hand, ordered them, with the defendants' assent, from wagon-builders in another city. The trucks were accepted and paid for by plaintiff. Some alterations were made by plaintiff at defendants' request, and a painter, employed by the defendant, painted their names and business on the side of the trucks while on the plaintiff's premises. *Held* a contract of sale of goods within the statute of frauds. The court said: "The trucks were existing at the time of the contract, *in solido*, and were not to be made according to order, nor as things distinguished from the general business of the plaintiffs, for they were in the direct line of their business, and with that knowledge the defendants sought them to obtain the trucks. Whether these articles which were needed were standing in the saleroom of the plaintiffs ready for delivery with slight alterations and adaptations, or whether they were in the salesroom of a business correspondent in a distant city, who was ready to sell and forward the goods to them on their credit, without knowing or caring who their customer might be, can make but little difference. The result would in either case be that by the intention of the parties there would be a transfer, for a price, from the plaintiffs to the defendants, of chattels in which the defendants had no previous property, and according to the rule formulated by Mr. Benjamin in his book on Sales (Corbin's ed., vol. 1. p. 121), this would be a contract for the sale of a chattel within the statute of frauds." This was in the court of errors and appeals, eleven judges concurring, the chief justice dissenting. See note, 54 Am. Rep. 164, and an extremely valuable one, 14 Lawy. Am. Rep. 230.

⁶ *Sewall v. Fitch*, 8 Cow. 215; *Parsons v. Loucks*, 48 N. Y. 17; 8 Am. Rep. 517 (contract to make paper, similar to other paper pre-

at the time of the order, and merely requires some alteration, modification or adaptation to the buyer's wishes or purposes, it is a contract of sale.⁷

viously made by defendant for plaintiff, of sizes and weights to be notified by letter, and requiring three weeks for completion); *Deal v. Maxwell*, 51 N. Y. 652 (a contract to make stocking shoddy); *Higgins v. Murray*, 73 N. Y. 252 (a contract to make circus tents from materials to be furnished by plaintiff); *Warren Chemical, etc., Co. v. Holbrook*, 118 N. Y. 586; 16 Am. St. Rep. 788 (contract for sale of patent roofing).

⁷ *Douns v. Ross*, 23 Wend. 270 (contract for wheat on hand, but to be threshed and cleaned); *Fitzsimmons v. Woodruff*, 1 Thomp. & C., 3 (contract for a marble mantel, to be put up in a house, with alterations and fixtures); *Smith v. N. Y., etc., R. Co.*, 4 Keyes, 117, but see *Killmore v. Howlett*, 48 N. Y. 569; (contract to deliver wood to be cut from standing trees); *Bates v. Coster*, 1 Hun, 400 (contract to buy a stallion colt, to be "altered" and kept by seller till well); *Kellogg v. Witherhead*, 6 Thomp. & C. 525 (contract to sell hams to be smoked); *Flint v. Corbitt*, 6 Daly, 429 (contract to buy furniture already made, but to be covered with materials selected and furnished by plaintiff); *Seymour v. Davis*, 2 Sandf. 239 (contract for cider to be bought from farmers, refined and delivered); *Cooke v. Millard*, 65 N. Y. 352; 22 Am. Rep. 619 (contract to buy certain lumber in plaintiffs' yard, to be cut into certain sizes). The rule is thus stated by DALY, C. J., in *Passaic Manuf. Co. v. Hoffman*, 3 Daly, 495: "where the contract is for an article coming under the general denomination of goods, wares and merchandise, and is made with one who sells that kind of commodity to all who traffic in it, the quantity required and the price being agreed upon, it is a contract of sale, and it in no way affects the character of the contract in such a case whether the manufacturer and vendor has, when the order is given, the requisite quantity on hand or has to manufacture it afterwards. But if what is clearly contemplated by the agreement is the skill, labor, care, or knowledge of the one who fabricates the article or commodity, or if it would not have been produced if the order had not been given for it, or if when produced it is unfitted for sale as a general article of merchandise, being adapted for use only by the person ordering it, then the contract is one for work and labor, and not within the statute." So in *Bird v. Muhlinbrink*, *supra*, it is said that the contract is one of sale unless the work and labor is "the essential consideration of the contract." This point received a very learned discussion in *Cooke v. Millard*, 65 N. Y. 352; 22 Am. Rep. 619, by

So in Maryland, it was held that a contract for future delivery of an ungathered crop is not a contract of sale.⁸

DWIGHT, Commissioner. He commented on the case of *Meade v. Case*, 33 Barb. 202, where the contract was to buy several pieces of marble already put together in the form of a monument, and standing in the yard of a marble cutter, but to be polished, lettered, and finished, and it was held a contract of manufacture, on the ground that there was no monument in existence, but only pieces of stone in the similitude of a monument. He says: "It is unnecessary to quarrel with this case. If unsound, it is only a case of misapplication of an established rule. If sound, it is a so-called border case, showing the requirements which are likely to arise in applying to various transactions the rule adopted in *Sewall v. Fitch*, and kindred cases. It is proper however to say that the notion that such an arrangement of marble placed in a cemetery over a grave cannot be regarded as a monument, in the absence of an inscription, seems highly strained. Then there could not be a memorial church without an inscription. There it could not have been said of Christopher Wren, in his relation to one of his great architectural productions, '*Si quæris monumentum circumspice*.' It would seem to be enough if the monument reminds the passer-by of him whom it is intended to commemorate, and this might be by tradition, inscription, on adjoining or neighboring objects, or otherwise." It is true that the bare stones might be a monument, but they were not the monument bargained for, and that required special and peculiar labor and care to fit it to the buyer's purpose, and it would not answer for any other customer. It would be just as logical to argue that a piece of brass or silver, of a certain suitable size, is a door-plate, without any name on it, because one could learn by inquiring from neighbors, who lived in the house for which it was ordered. As to a "monument" a nicer question might arise in the case of one of those ready-made gravestones quite commonly kept in stock in New England, with devices, epitaphs and Scripture texts ready engraved, and only requiring filling up, like a law-blank. The writer once heard of one of these ordered by a man for a neighbor who had buried his wife. At the top it had a hand with the index finger pointing upwards, and the inscription, "No graves there!" The bereaved widower repudiated it because his name was Graves!

⁸ *Eichelberger v. McCauley*, 5 Har. & J. 213; 9 Am. Dec. 514; *Rentch v. Long*, 27 Md. 188. The English rule, laid down in *Lee*

It is however recognized by the New York courts that if the article is to be made in a special manner, somewhat different from those usually kept in stock by the manufacturer, it is a contract of manufacture.⁹

An oral agreement, at the time of the sale, to take back the goods on request and refund the price, is binding,¹⁰ but otherwise if the promise is subsequent.¹¹

Auction sales are within the statute.¹²

v. Griffin, 1 B. & S. 272, is thus stated by Mr. Benjamin (Sales, § 102): "if the contract is intended to result in transferring for a price from B. to A. a chattel in which A. had no previous property, it is a contract for the sale of a chattel, and unless that be the case there can be no sale." In the case cited the cause of action was artificial teeth made for the defendant's testator. It is evident that this rule differs from both the American rules, as is pointed out in Mr. Bennett's note (Benj. Sales, p. 108), (and in note (14 Lawy. Ann. Rep. 232), but as these pointed out, the English statute explicitly includes goods not yet made or fit for delivery or requiring some further act to render them so fit. Mr. Lawson prefers the English rule (Cont. § 86); but it is evident that it can be adopted in this country only by judicial legislation.

⁹ *Donnell v. Hearn*, 12 Daly, 230 (a contract to make certain lamps of a peculiar and unusual pattern); *Pierce v. Bouton*, 17 N. Y. Week. Dig. 445 (a contract to imitate certain woven goods in felt, of a kind not usually dealt in by plaintiff); *Parker v. Schenck*, 28 Barb. 38.

¹⁰ *Fay v. Wheeler*, 44 Vt. 202; *Johnston v. Trask*, 116 N. Y. 136; 15 Am. St. Rep. 394.

¹¹ *Rankins v. Grupe*, 36 Hun, 481.

¹² *Davis v. Rowell*, 2 Pick. 64; 13 Am. Dec. 398; *Pike v. Balch*, 38 Me. 302; 61 Am. Dec. 248; *Johnson v. Buck*, 35 N. J. L. 338; 10 Am. Rep. 243; *Davis v. Robertson*, 1 Mill, 71; 12 Am. Dec. 611.

CHAPTER II.

WHAT ARE GOODS, WARES AND MERCHANDISE.

Things in Action.—The English rule does not embrace these. In some States, like New York, the statute explicitly covers “things in action.” Generally the American statutes are held to cover incorporeal property and things in action, such as accounts, bank-bills, corporate stocks, promissory notes.¹ It is evident however that they do not include some incorporeal things which are the subject of sale, as for example, knowledge of the existence and locality of an oil well, or a license or privilege or annuity. (See *ante*, p. 34.)

But the thing in action or the incorporeal property must be in existence. Therefore a contract to sell an interest in an invention before letters patent, or

¹ Walker v. Supple, 54 Ga. 178; Gooch v. Holmes, 41 Me. 523; Tisdale v. Harris, 20 Pick. 9; Boardman v. Cutter, 128 Mass. 388; North v. Forest, 15 Conn. 400; Pray v. Mitchell, 60 Me. 430; Colvin v. Williams, 3 H. & J. 38; 5 Am. Dec. 417; Baldwin v. Williams, 3 Metc. 367; Hudson v. Weir, 29 Ala. 294. *Contra*: Whittemore v. Gibbs, 24 N. H. 484. Under a statute speaking only of “goods,” things in action do not pass. Vawter v. Griffin, 40 Ind. 600. Under the New York statute a contract for the sale of gold coin was held to come. Peabody v. Speyers, 56 N. Y. 230.

stock of a company not yet organized, would not be within the statute.²

Fixtures and Crops.—A sale of fixtures, to be severed, is a sale of goods, wares, and merchandise; as mill-stones, etc., in a mill; manure on a farm; buildings placed on the land of another with an agreement for removal.³

Natural productions, such as grass, fruit, trees, etc., are goods, wares, and merchandise, if it is intended that they are to be severed and carried away within a reasonable time, and not left to mature.⁴

Artificial or annual crops, such as corn, grain, turnips, etc., are goods, wares and merchandise.⁵

² *Somerby v. Buntin*, 118 Mass. 279; 19 Am. Rep. 459; *Gadsden v. Lance*, 1 McMull. Eq. 87; 37 Am. Dec. 548; *Green v. Brookins*, 23 Mich. 48; 9 Am. Rep. 74.

³ *Bostwick v. Leach*, 3 Day, 476; *Strong v. Doyle*, 110 Mass. 92; *Dame v. Dame*, 38 N. H. 429; 75 Am. Dec. 195; *Shaw v. Carbrey*, 13 Allen, 462; *Scoggin v. Slater*, 22 Ala. 687; *Rogers v. Cox*, 96 Ind. 157; 49 Am. Rep. 152; *Cent. Branch R. v. Fritz*, 20 Kans. 430; 27 Am. Rep. 175; *Long v. White*, 42 Ohio St. 59.

⁴ *Whitmarsh v. Walker*, 1 Metc. 313 (nursery trees and shrubs); *Claffin v. Carpenter*, 4 Metc. 580; 38 Am. Dec. 381; *Erskine v. Plummer*, 7 Greenl. 447; 22 Am. Dec. 216; *McClintock's Appeal*, 71 Pa. St. 365; *Sterling v. Baldwin*, 42 Vt. 306; *Smith v. Ryan*, 5 Md. 41; 59 Am. Dec. 104; *Killmore v. Howlett*, 48 N. Y. 569 (standing trees, etc.); *Banton v. Shorey*, 77 Me. 48 (ripe grass); *Purner v. Piercy*, 40 Md. 212; 17 Am. Rep. 591 (crop of fruit); *Higgins v. Kusterer*, 41 Mich. 318; 32 Am. Rep. 160 (crop of ice); but see *contra*, as to standing trees, *Slocum v. Seymour*, 36 N. J. L. 138; 13 Am. Rep. 432; *Owens v. Lewis*, 46 Ind. 488; 15 Am. Rep. 295.

⁵ *Dunne v. Ferguson*, 1 Hayes, 540; *Bricker v. Hughes*, 4 Ind. 146; *Marshall v. Ferguson*, 23 Cal. 65; *Brittain v. McKay*, 1 Ired. L. 265; 35 Am. Dec. 738; *Bull v. Griswold*, 19 Ill. 631; *Moreland v. Myall*, 14 Bush, 474; *Westbrook v. Eager*, 16 N. J. L. 81; *Kingsley v. Holbrook*, 45 N. H. 313; 86 Am. Dec. 173.

CHAPTER III.

THE PRICE OR VALUE.

Several Articles in one Sale.—Where several articles are sold at the same time, the aggregate price exceeding the statutory limit, but the price of no one exceeding it, the question is whether it was intended as one sale or several distinct sales, and this is only determinable by the facts of each case.¹ Differences in mode of payment or time of delivery may make the contract severable.² In some cases, if the articles were of different kinds, the contract has been held severable and enforceable as to the lawful items.³

Auction sales of lots are considered distinct generally, when not naturally or necessarily connected, and especially when not consecutive to the same buyer.⁴

¹ *Gilman v. Hill*, 36 N. H. 318; *Gault v. Brown*, 48 Id. 183. In *Allard v. Greasert*, 61 N. Y. 1, it was held that a sale at one time of several different lots and styles of hats, at different prices, was an entire contract, and within the statute.

² *Aldrich v. Pyatt*, 64 Barb. 391; *Barclay v. Tracy*, 5 W. & S. 45.

³ *Goodwin v. Clark*, 65 Me. 280; *Walker v. Lovell*, 28 N. H. 138; 61 Am. Dec. 605 (case of spirituous liquors and other goods).

⁴ *Wells v. Day*, 124 Mass. 38; *Van Eps v. Schenectady*, 12 Johns. 436; 7 Am. Dec. 330; *Stoddart v. Smith*, 5 Binney, 355. But *contra*, *Jenness v. Wendell*, 51 N. H. 63; 12 Am. Rep. 48; even where the sales were on different days; *Mills v. Hunt*, 17 Wend. 333; 20 Id. 431; see *Coffman v. Hampton*, 2 W. & S. 377.

If the price is *unfixed*, owing to uncertainty as to the quantity, and the aggregate proves to exceed the statutory limit, the sale is within the statute, although no one item exceeds the statutory limit.⁵

⁵ Bowman v. Conn, 8 Ind. 58; Brown v. Sanborn, 21 Minn. 402; Carpenter v. Galloway, 73 Ind. 418. See Hodges v. Richmond Manuf. Co., 9 R. I. 482.

CHAPTER IV.

ACCEPTANCE AND RECEIPT.

THE first exception in the statute is in case the buyer shall accept part of the goods sold and actually receive the same.

Acceptance by agent of the buyer is binding on him.¹ But delivery to a common carrier does not have this effect,² even though such delivery is directed by the purchaser.³

Acceptance.—There must be acceptance as well as receipt,⁴ and so mere receipt does not constitute acceptance, even though the buyer ought to accept.⁵

¹ *Snow v. Warner*, 10 Metc. 132; 43 Am. Dec. 417; *Jones v. Mechanics' Bank*, 29 Md. 287; 96 Am. Dec. 533; *Barkley v. Rens.*, etc., R. Co., 71 N. Y. 205.

² *Maxwell v. Brown*, 39 Me. 98; 63 Am. Dec. 605; *Loyd v. Wight*, 20 Ga. 574; 65 Am. Dec. 636; *Grimes v. Van Vechten*, 20 Mich. 410; *Hansman v. Nye*, 62 Ind. 485; 30 Am. Rep. 199; *Atherton v. Newhall*, 123 Mass. 141; 25 Am. Rep. 47.

³ *Allard v. Greasert*, 61 N. Y. 1; *Johnson v. Cuttle*, 105 Mass. 447; 7 Am. Rep. 545; *Fontaine v. Bush*, 40 Minn. 141; 12 Am. St. Rep. 722; *Bellen v. Henkel*, Colo. ; *Jones v. Mech. Bank*, *supra*. But *Spencer v. Hale*, 30 Vt. 314; 73 Am. Dec. 309.

⁴ *Canlkins v. Hellman*, 47 N. Y. 449; 7 Am. Rep. 461.

⁵ *Stone v. Browning*, 51 N. Y. 211; 68 N. Y. 598; *Remick v. Sandford*, 120 Mass. 309; *Hewes v. Jordan*, 39 Md. 472; 17 Am. Rep. 578; *Bacon v. Eccles*, 43 Wis. 227; *Gibbs v. Benjamin*, 45 Vt. 124.

Mere words do not indicate a conclusive acceptance,⁶ but it may be indicated by a resale of the goods⁷ (although probably not by a mere offer before the goods are received);⁸ or any other indisputable act of ownership.⁹ The acceptance may be before or after receipt, as well as simultaneous.¹⁰ The question is one of fact,¹¹ subject to the right of the court to direct a verdict where the proofs fall short,¹² and the burden of proof is on the party alleging it.^{12a}

Receipt.—The goods must be actually received as well as accepted, in whole or in part,¹³ even if bulky.¹⁴

Receipt by agent is binding.¹⁵ A carrier designated by the purchaser is a good agent to receive.¹⁶ And so may be the seller himself, when authorized by the buyer to receive, or hold them if already in his pos-

⁶ Bailey v. Ogden, 3 Johns, 399; 3 Am. Dec. 509; Knight v. Mann, 120 Mass. 219.

⁷ Hill v. McDonald, 17 Wis. 97; Phillips v. Ocmulgee Mills, 55 Ga. 633; Marshall v. Ferguson, 23 Cal. 65.

⁸ Jones v. Mechanics' Bank, 29 Md. 287; 96 Am. Dec. 533; Gorham v. Fisher, 30 Vt. 431.

⁹ Gray v. Davis, 10 N. Y. 285 (taking of keys and inventory); Pinkham v. Mattox, 53 N. H. 606; Meehan v. Sharp, 151 Mass. 564.

¹⁰ Cross v. O'Donnell, 44 N. Y. 661; 4 Am. Rep. 721; Hewes v. Jordan, 39 Md. 472; 17 Am. Rep. 578.

¹¹ Hinchman v. Lincoln, 124 U. S. 48.

¹² Stone v. Browning, 68 N. Y. 598; Pinkham v. Mattox, 53 N. H. 604; Denny v. Williams, 5 Allen, 5.

^{12a} Prescott v. Locke, 51 N. H. 94; 12 Am. Rep. 55; Quintard v. Bacon, 99 Mass. 185; Young v. Blaisdell, 60 Me. 272.

¹³ Michael v. Curtis, 60 Conn. 363.

¹⁴ Shindler v. Houston, 1 N. Y. 261; 49 Am. Dec. 316 (lumber).

¹⁵ Dean v. Tallman, 105 Mass. 443.

¹⁶ Cross v. O'Donnell, 44 N. Y. 661; 4 Am. Rep. 721.

session.¹⁷ But in this case the buyer must be entitled to possession free of liens of the seller, and the seller must act as his bailee. So if the seller refuses to deliver until his lien is satisfied, there is no receipt.¹⁸ A *third person*, in whose possession the goods are, may be constituted by the buyer his agent to receive and hold them, and if he assents, this makes a valid receipt,¹⁹ but at least notice of the sale to the third person seems essential.²⁰

The receipt may be long after the sale.²¹

The acceptance and receipt must be of part of the goods sold, and so receipt of a sample specimen is not sufficient.²² If the buyer receives and accepts part as representing the whole, this makes the contract binding for the remainder, although destroyed by fire before delivery, even if by the contract the rest is not to be delivered till long after the first.²³ But the receipt and acceptance must be with intent to

¹⁷ *Weld v. Came*, 98 Mass. 152; *Janvrin v. Maxwell*, 23 Wis. 51; *Green v. Merriam*, 28 Vt. 801; *Means v. Williamson*, 37 Me. 556; *Jackson v. Watts*, 1 McCord, 288.

¹⁸ *Hinchman v. Lincoln*, 124 U. S. 49; *Marsh v. Rouse*, 44 N. Y. 643; *Rodgers v. Jones*, 129 Mass. 422; *Edwards v. Grand Trunk R.*, 54 Me. 105; *Messer v. Woodman*, 22 N. H. 172; 53 Am. Dec. 241.

¹⁹ *King v. Jarman*, 35 Ark. 190; 37 Am. Rep. 11.

²⁰ *Boardman v. Spooner*, 13 Allen, 353; *Bassett v. Camp*, 54 Vt. 232.

²¹ *McKnight v. Dunlop*, 5 N. Y. 537; 55 Am. Dec. 370; *Marsh v. Hyde*, 3 Gray, 331; *Bush v. Holmes*, 53 Me. 417; *Richardson v. Squires*, 37 Vt. 640; *Schmidt v. Thomas*, 75 Wis. 529; *Buckingham v. Osborne*, 44 Conn. 133; *McCarthy v. Nash*, 14 Minn. 127.

²² *Damon v. Osborn*, 1 Pick. 476; 11 Am. Dec. 229.

²³ *Townsend v. Hargraves*, 118 Mass. 325; *Rickey v. Tenbroeck*, 63 Mo. 563; *Farmer v. Gray*, 16 Neb. 401.

take the whole, and so if on receiving and accepting part he declines to take any more, he will not be liable for more.²⁴ Acceptance and receipt implies mutual assent and is necessary to bind the seller as well as the buyer.²⁵ If a contract to repurchase by the seller was part of the agreement, this is made binding by acceptance and receipt.²⁶

²⁴ *Atherton v. Newhall*, 123 Mass. 141; 25 Am. Rep. 47; *Pratt v. Chase*, 40 Me. 269; *Simpson v. Krumdick*, 28 Minn. 352.

²⁵ *Washington Ice Co. v. Webster*, 62 Me. 341; 16 Am. Rep. 462; *Clark v. Tucker*, 2 Sandf. 159.

²⁶ *Fay v. Wheeler*, 44 Vt. 292; *Lumsden v. Davies*, 11 Ont. App. 585; *Wulschner v. Ward*, 115 Ind. 223.

CHAPTER V.

PART PAYMENT.

THE second exception in the statute is "the giving something in earnest to bind the bargain, or in part payment."

The payment must be intended to evidence the assent to the bargain. So a deposit of money, or of a check, in the hands of a third person, as a "forfeiture" in case of refusal to take the goods, will not bind the bargain.¹

Something of value must be parted with and received with the intention of part payment. So a mere promise to pay to a creditor of the seller will not answer² although such actual payment would.³ A credit upon an account or demand of the buyer against the seller will not avail unless it is actually made or a receipt or voucher given thereof.⁴ And if a creditor of the seller accepts the mere promise of the buyer and actually discharges his claim against the seller, this may operate as payment.⁵ The payment to the

¹ *Howe v. Hayward*, 108 Mass. 54; 11 Am. Rep. 306; *Noakes v. Morey*, 30 Ind. 103.

² *Artcher v. Zeh*, 5 Hill, 205; *Paine v. Fulton*, 34 Wis. 83.

³ *Brady v. Harrahy*, 21 U. C. Q. B. 340.

⁴ *Brabin v. Hyde*, 32 N. Y. 519.

⁵ *Cotterill v. Stevens*, 10 Wis. 422.

seller need not be in money, but may be in anything of value.⁶

Payment must be accepted as well as tendered, otherwise there is no bargain thus evidenced.⁷

In New York the payment must be at the time of the sale,⁸ or the contract must be substantially renewed at the time of payment,⁹ but elsewhere the time is immaterial, if before suit.¹⁰

The payment can be made to apply only on goods already sold, and cannot operate as a consideration for a new agreement to sell others, although the buyer claims that all were included in the first contract.¹¹

⁶ *Dow v. Worthen*, 37 Vt. 108 (a chattel); *Combs v. Bateman*, 10 Barb. 573 (a third person's note); *Hunter v. Wetsell*, 17 Hun, 135 (his check).

⁷ *Edgerton v. Hodge*, 41 Vt. 676.

⁸ *Allis v. Read*, 45 N. Y. 142.

⁹ *Hunter v. Wetsell*, 57 N. Y. 375; 15 Am. Rep. 508.

¹⁰ *Gault v. Brown*, 48 N. H. 189; *Thompson v. Alger*, 12 Metc. 435; *Davis v. Moore*, 13 Me. 424.

¹¹ *Organ v. Stewart*, 60 N. Y. 413; *contra*, *Cummings v. Arnold*, 3 Metc. 486; 37 Am. Dec. 155.

CHAPTER VI.

THE MEMORANDUM OR NOTE.

THE third exception in the statute is where a note or memorandum in writing is made and signed by the parties to be charged, or their agents lawfully authorized.

When the memorandum must be made.—The statute is silent as to the time of making. It seems settled in England that it must be before suit,¹ but as it is not the contract but only evidence of the contract, it would seem that it may be made at any time before trial. So it is said that an agent may bind his principal by making a memorandum of a former contract, even after the termination of his agency.²

Delivery.—The memorandum need not be delivered, or addressed, or even communicated to the other party. So it is enough if it is contained in a letter to a third person,³ or to the writer's agent,⁴ or in an entry in the defendant's private book.⁵ It may even

¹ *Bird v. Munroe*, 66 Me. 337 ; 22 Am. Rep. 571.

² *Williams v. Bacon*, 2 Gray, 387.

³ *Moore v. Mountcastle*, 61 Mo. 424.

⁴ *Kleeman v. Collins*, 9 Bush. 467.

⁵ *Peabody v. Speyers*, 56 N. Y. 230 ; *Johnson v. Trinity Church*, 11 Allen, 123 ; *Argus Co. v. City of Albany*, 55 N. Y. 495 ; 14 Am. Rep. 296 (resolution of common council, signed by clerk, in minutes).

repudiate the contract, and yet furnish binding evidence of it.⁶ Parol evidence is admissible to show that it does not correctly recite the contract.⁷

Different papers and times.—The memorandum need not be contained in one paper nor be made at one time. It may be contained in correspondence, writings, or telegrams relating to the one transaction,⁸ and oral evidence is competent to connect them,⁹ but not to supply a defect in the writings.^{9a} An unsigned paper however cannot be so connected, nor considered, unless some signed paper refers to it,¹⁰ or is physically attached to it,¹¹ even though the unsigned paper refers to the signed one.¹² The different papers must be consistent; so a material variance between a broker's bought and sold notes is fatal.^{12a}

Elements of the memorandum.—It must contain all

⁶ *Drury v. Young*, 58 Md. 546; 42 Am. Rep. 343; *Louisville Co. v. Lorick*, 29 S. C. 533; 2 Lawy. Ann. Rep. 212.

⁷ *Benj. Sales*, §§ 208, 209.

⁸ *Lerned v. Wannemacher*, 9 Allen, 412; *Peck v. Vandemark*, 99 N. Y. 29; *Ryan v. U. S.*, 136 U. S. 83; *Austin v. Davis*, 128 Ind. 472; 25 Am. St. Rep. 456; *Coe v. Tough*, 116 N. Y. 273.

⁹ *Thayer v. Luce*, 22 Ohio St. 62.

^{9a} *Ross v. Allen*, 45 Kans. 231; 10 Lawy. Ann. Rep. 835.

¹⁰ *Frank v. Miller*, 38 Md. 461. So an oral agreement is not supported by an unsigned entry in the seller's book; *North v. Mendel*, 73 Ga. 400; 54 Am. Rep. 879; *Smith v. Jones*, 66 Ga. 338; 42 Am. Rep. 72.

¹¹ *Tallman v. Franklin*, 14 N. Y. 584.

¹² *Brown v. Whipple*, 58 N. H. 229; *Johnson v. Buck*, 35 N. J. L. 338; 10 Am. Rep. 243; *Freeport v. Bartol*, 3 Greenl. 340; *Morton v. Dean*, 13 Metc. 388; *Ridgway v. Ingram*, 50 Ind. 145; 19 Am. Rep. 706; *Smith v. Jones*, 66 Ga. 338; 42 Am. Rep. 72; *Beckwith v. Talbot*, 95 U. S. 289.

^{12a} *Butters v. Glass*, 31 U. C. Q. B. 379; *Calkins v. Falk*, 1

the essentials.¹³ It need not state the *consideration* unless the statute requires it.

Names of Parties.—Both parties must be in some way described.¹⁴ Abbreviations may be sufficient.¹⁵ There is some difference of opinion whether oral evidence is competent to distinguish the buyer from the seller in case of doubt. The weight of opinion seems to be in the affirmative.¹⁶ But the word “sold” sufficiently implies a purchase.¹⁷ The principal is bound by a memorandum signed by his agent in his own name.¹⁸

Subject Matter.—The article must be intelligibly described.¹⁹ But the weight of “39 bales of cotton at 40 cents” need not be stated.²⁰

Abb. Ct. App. Dec. 291; *Bacon v. Eccles*, 43 Wis. 227; *Canterberry v. Miller*, 76 Ill. 355.

¹³ *Stone v. Browning*, 68 N. Y. 598; *Nichols v. Johnson*, 10 Conn. 198.

¹⁴ *Grafton v. Cummings*, 99 U. S. 100; *Lincoln v. Erie Preserving Co.*, 132 Mass. 129; *Anderson v. Harold*, 10 Ohio, 399; *Calkins v. Falk*, 1 Abb. Ct. App. Dec. 291; *McElroy v. Seery*, 61 Md. 397; *O'Sullivan v. Overton*, 56 Conn. 104; *Ross v. Allen*, 45 Kans. 231; 10 Lawy. Ann. Rep. 835; *Mentz v. Newwitter*, 122 N. Y. 491; (auctioneer's memorandum).

¹⁵ *Lee v. Cherry*, 85 Tenn. 707; 4 Am. St. Rep. 800 (as “Mr. Lee”).

¹⁶ *Salmon Falls Manuf. Co. v. Goddard*, 14 How. 458 (by a bare majority of the court); *Sanborn v. Flagler*, 9 Allen, 474; *Coate v. Terry*, 24 U. C., C. P. 571; *contra*: *Bailey v. Ogden*, 3 Johns. 399; 3 Am. Dec. 509.

¹⁷ *Butler v. Thompson*, 92 U. S. 412.

¹⁸ *Salmon Falls Manuf. Co. v. Goddard*, 14 How. 458; *Dykers v. Townsend*, 24 N. Y. 61; *Gowen v. Klous*, 101 Mass. 449.

¹⁹ *May v. Ward*, 134 Mass. 127; *McElroy v. Buck*, 35 Mich. 434.

²⁰ *Penniman v. Hartshorn*, 13 Mass. 87.

Price, if agreed, must be stated or be ascertainable. If not agreed, the law will imply a reasonable price,^{20a} and this may be shown by parol.²¹

Time of payment.—Any credit must be stated, but if no time is agreed, it is construed as a cash sale,²² and this need not be specified.²³

Delivery.—Time and place of delivery, if agreed, must be stated.²⁴ If not agreed, the time of delivery is on demand and payment,²⁵ and may not be varied by parol.²⁶

Any other terms agreed on as part of the contract must be expressed in it. As where the sale was “subject to buyer’s approval, or by sample, or with warranty.”²⁷

^{20a} *Ide v. Stanton*, 15 Vt. 685 ; 40 Am. Dec. 698 ; *Ashcroft v. Butterworth*, 136 Mass. 511 ; *Phelps v. Stillings*, 60 N. H. 505 ; *Kinloch v. Savage*, Speer Eq. 474 ; *Adams v. McMillan*, 7 Port. 73 ; *Soles v. Hickman*, 20 Pa. St. 342 ; 72 Am. Dec. 635 ; *Hanson v. Marsh*, 40 Minn. 3. *Contra* : *O’Neil v. Crain*, 67 Mo. 250.

²¹ *Hoadly v. McLaine*, 10 Bing. 482 ; *Argus Co. v. Albany*, 55 N. Y. 495 ; 14 Am. Rep. 296 ; *Norton v. Gale*, 95 Ill. 533 ; 35 Am. Rep. 173. But see *James v. Muir*, 33 Mich. 224.

²² *Wright v. Weeks*, 25 N. Y. 158 ; *Norris v. Blair*, 39 Ind. 90 ; 10 Am. Rep. 135 ; so where the memorandum merely stated, “one-third cash down,” held, insufficient ; *O’Donnell v. Lee-man*, 43 Me. 158 ; 69 Am. Dec. 54.

²³ *Williams v. Robinson*, 73 Me. 186 ; 40 Am. Rep. 352.

²⁴ *Kriete v. Myer*, 61 Md. 558 ; *Smith v. Shell*, 82 Mo. 215 ; 52 Am. Rep. 365.

²⁵ *Hawkins v. Chace*, 19 Pick. 502.

²⁶ *Williams v. Robinson*, *supra*.

²⁷ *Boardman v. Spooner*, 13 Allen, 353 ; 90 Am. Dec. 196 ; *McMullen v. Helberg*, 6 L. R. (Ir.) 463 ; *Peltier v. Collins*, 3 Wend. 459 ; 20 Am. Dec. 711.

CHAPTER VII.

THE SIGNATURE.

Signing imperative.—An unsigned bill of items and prices will not answer the statute.¹

Who must sign.—Only “the party to be charged,” *i. e.*, the one sued, need sign, and this is so although the statute reads “parties.” An oral acceptance of a written proposition binds the signer.²

Manner of signing.—The signature may be printed or stamped, if shown to be authorized.² Initials will

¹ *McElroy v. Seery*, 61 Md. 389; 48 Am. Rep. 110.

² *Justice v. Lang*, 42 N. Y. 493; 1 Am. Rep. 576; 52 N. Y. 323; *Sanborn v. Flagler*, 9 Allen, 474; *Williams v. Robinson*, 73 Me. 186; 40 Am. Rep. 352; *Mason v. Decker*, 72 N. Y. 595; 28 Am. Rep. 190; *Smith v. Smith*, 8 Blackf. 208; *Barstow v. Gray*, 3 Greenl. 409; *Lowber v. Connit*, 36 Wis. 176; *Ivory v. Murphy*, 36 Mo. 534; *Lowry v. Mehaffy*, 10 Watts. 387; *De Cordova v. Smith*, 9 Tex. 129; 58 Am. Dec. 136; *Gartrell v. Stafford*, 12 Neb. 545; 41 Am. Rep. 767; *Sabre v. Smith*, 62 N. H. 663; *Ellsworth v. So., etc., Co.*, 31 Minn. 543. *Contra*: *Wilkinson v. Heavenrich*, 58 Mich. 574; 55 Am. Rep. 708; *Corbitt v. Salem Gas-light Co.*, 6 Oreg. 405; 25 Am. Rep. 541, and note. *Justice v. Lang* was doubted, although followed, on the second appeal, and on oral evidence of acceptance it was left to the jury to say whether the defendant had agreed to accept and pay. This doctrine has been followed since in New York.

² *Boardman v. Spooner*, 13 Allen, 353; *Brayley v. Kelly*, 25 Minn. 160.

suffice,³ or a mark,⁴ or figures,⁵ or a fictitious name,⁶ on proof of authority or intention.

Place of signing.—The signature need not be at the bottom or end, but if placed anywhere in the writing for the purpose of authentication, it is sufficient. So a bill, “A. bought of B.,” will suffice,⁷ and so where the memorandum is written, unsigned, on letter-paper with the name printed at the top.⁸ But if the language of the statute is “subscribed” instead of “signed,” the signature must be at the end.⁹

³ *Sanborn v. Flagler*, 9 Allen, 474; *Merchants' Bank v. Spicer*, 6 Wend. 443; *Salmon Falls Manuf. Co. v. Goddard*, 14 How. 446.

⁴ *Bickley v. Keenan*, 60 Ala. 293.

⁵ *Brown v. Butchers' Bk.*, 6 Hill, 443; 41 Am. Dec. 755.

⁶ *Augur v. Couture*, 68 Me. 427.

⁷ *Hawkins v. Chace*, 19 Pick. 502.

⁸ *Drury v. Young*, 58 Md. 546; 42 Am. Rep. 343; *Evans v. Hoare*, 1 Q. B. (1892) 593.

⁹ *James v. Patten*, 6 N. Y. 9; 55 Am. Dec. 376.

CHAPTER VIII.

AGENTS DULY AUTHORIZED TO SIGN.

THE statutes generally provide that the memorandum may be signed by the party's agent duly authorized to sign.

This point is regulated by the general rules of agency.

An *undisclosed principal* is bound by a memorandum signed by the auctioneer in his own name.¹

There seems to be no good reason in principle why one party may not authorize the other to sign for him, despite the English cases to the contrary,² but certainly it cannot be done without authority.³

Auctioneers.—An auctioneer may sign for the sellers,⁴ and so may his clerk, in his presence and that of the parties.⁵ He has no implied authority to sign

¹ *Salmon Falls Manuf. Co. v. Goddard*, 14 How. 458 ; *Dykers v. Townsend*, 24 N. Y. 61 ; *Gowen v. Klous*, 101 Mass. 449 ; *Yerby v. Grigsby*, 9 Leigh, 387 ; *Conaway v. Sweeney*, 24 W. Va. 649.

² *Wright v. Dannah*, 2 Camp. 203.

³ *Sewall v. Fitch*, 8 Cowen, 215 ; *Bamber v. Savage*, 52 Wis. 110 ; 38 Am. Rep. 723 ; *Ijams v. Hoffman*, 1 Md. 435 ; *Carmack v. Masterson*, 3 Stew. & Port. 411 ; *Cathcart v. Keirnaghan*, 5 Strob. 129.

⁴ *Gill v. Hewett*, 7 Bush. 10.

⁵ *Alna v. Plummer*, 4 Greenl. 258 ; *Smith v. Jones*, 7 Leigh, 165 ; 30 Am. Dec. 498 ; *Price v. Durin*, 56 Barb. 647 ; *Harvey v. Stevens*, 43 Vt. 653.

for the buyer, but he or his clerk may do so, at the time and place of the sale and in presence of the parties, assent being thus implied,⁶ but not otherwise.⁷ And one selling his own goods at auction has no implied authority to sign for the buyer,⁸ although his clerk might do so in the circumstances above stated.⁹

Brokers may sign so as to bind both parties,¹⁰ and so may their clerks in their presence and by their direction.¹¹

⁶ *Gill v. Bicknell*, 2 Cush. 355; *McComb v. Wright*, 4 Johns. Ch. 659.

⁷ *Horton v. McCarty*, 53 Me. 394; *Bamber v. Savage*, 52 Wis. 110; 38 Am. Rep. 723.

⁸ *Bent v. Cobb*, 9 Gray, 397; 69 Am. Dec. 295; *Smith v. Arnold*, 5 Mason, 414; *Tull v. David*, 45 Mo. 444; 100 Am. Dec. 385.

⁹ *Frost v. Hill*, 3 Wend. 386; *Johnson v. Buck*, 35 N. J. L. 342; 10 Am. Rep. 243.

¹⁰ *Butler v. Thomson*, 92 U. S. 412; *Newberry v. Wall*, 84 N. Y. 576; *Coddington v. Goddard*, 16 Gray, 436.

¹¹ *Williams v. Woods*, 16 Md. 220.

PART III.

EFFECT OF THE CONTRACT IN PASSING PROPERTY.

CHAPTER I.

SALE OF SPECIFIC CHATTELS.—UNCONDITIONAL OR CONDITIONAL.

ON the sale of a specific chattel, without condition as to delivery or payment, title passes immediately, even before delivery or payment, the consideration being the promises to pay and deliver, and not the actual payment and delivery.¹

But where (1) the seller is to do anything to fit the thing for delivery or confer an evidence title, according to the contract, or (2) where the thing is to be weighed, measured, counted or tested in order to ascertain the price, or (3) where the buyer is to do anything (as, for example, make payment) before title is to pass, title will not pass until fulfillment of such conditions precedent, although delivery may have been made.²

¹ Benj. Sales, §§ 313-317.

² Blackburn Sales, p. 151 ; Fuller v. Bean, 34 N. H. 290 ; Gibbs v. Benjamin, 45 Vt. 124.

1. If the seller is by the agreement to finish, prepare or modify the goods, title does not pass till this is done, unless the contrary intention clearly appears from the circumstances.³ Thus, where fish are to be dried, charcoal is to be burned to a finish, cider to be barreled, cotton to be ginned or baled, lumber to be cut into sizes, these are conditions precedent to the vesting of title, although payment may have been made.⁴ So if it was agreed that there was to be a formal bill of sale.⁵

2. If the articles are to be weighed, measured, counted or tested *by the seller, and before actual delivery*, in order to ascertain the price, title does not pass until this is done, unless the contrary intention appears.⁶ This principle, it will be noted, relates only

³ *Foster v. Ropes*, 111 Mass. 10 ; *West Jersey R. Co. v. Trenton Car Works*, 32 N. J. L. 517 ; *Groff v. Belche*, 62 Mo. 400 ; *Bond v. Greenwald*, 4 Heisk. 453 ; *Pinkham v. Appleton*, 82 Me. 577 ; *New Haven Wire Co. Cases*, 57 Conn. 385 ; *Jennings v. West*, 40 Kans. 373.

⁴ *Foster v. Ropes*, *supra* ; *Hale v. Huntley*, 21 Vt. 147 ; *Gilbert v. N. Y. Cent. R. Co.*, 4 Hun, 378 ; *Smith v. Sparkman*, 55 Miss. 649 ; 30 Am. Rep. 537 ; *Cooke v. Millard*, 65 N. Y. 352 ; 22 Am. Rep. 619.

⁵ *Higgins v. Chessman*, 9 Pick. 10.

⁶ *Prescott v. Locke*, 51 N. H. 94 ; 12 Am. Rep. 55 ; *Hahn v. Fredericks*, 30 Mich. 223 ; 18 Am. Rep. 119 ; *Pittsburgh, etc., Ry. Co. v. Heck*, 50 Ind. 303 ; 19 Am. Rep. 713 ; *Kein v. Tupper*, 52 N. Y. 550 ; *Elgee Cotton Cases*, 23 Wall. 180 ; *McClung v. Kelley*, 21 Iowa, 508 ; *Rosenthal v. Kahn*, 19 Oreg. 571 ; *Blackwood v. Cutting Pack. Co.*, 76 Cal. 212 ; *Jennings v. Flanagan*, 5 Dana, 217 ; 30 Am. Dec. 683 ; *Nicholson v. Taylor*, 31 Pa. St. 128 ; 72 Am. Dec. 728 ; *Sherwin v. Mudge*, 127 Mass. 547 ; *Frost v. Woodruff*, 54 Ill. 155 ; *McDonough v. Sutton*, 35 Mich. 1 ; *Pike v. Vaughn*, 39 Wis. 499 ; *Cleveland v. Williams*, 29 Tex. 204 ; 94 Am. Dec. 274. The rule is applied with great strictness in *Elgee Cotton Cases*, *supra*, where the court disapprove the

to something which by the agreement is to be done *by the seller, and before manual delivery*. Very apt illustrations are the following: a raft of timber, at so much per thousand, "when inspected and measured;"⁷ "three tons of hay to be weighed out of the large mow;"⁸ lumber, to be paid for "when delivered, inspected and measured."

So *delivery* itself may be effectually made an express or implied condition precedent to the passing of title, although ordinarily it is not essential, yet the parties by express agreement may make it essential to the vesting of title.⁹

The language of the contract may be so explicit as to indicate the intention to vest title immediately, even though the seller is still to do something to the goods or something must still be done to them to ascertain the price.¹⁰ So although counting, measur-

milder views of *Crofoot v. Bennett*, 2 N. Y. 258; *Kimberly v. Patchin*, 19 Id. 330; 75 Am. Dec. 334; and *Russell v. Carrington*, 42 N. Y. 118; 1 Am. Rep. 498; as "not in accordance generally with the authorities in this country," and as in conflict with *Kein v. Tupper*, 52 N. Y. 553.

⁷ *Devane v. Fennell*, 2 Ired. L. 37.

⁸ *Davis v. Hill*, 3 N. H. 382. See also *Smart v. Batchelder*, 57 N. H. 140; *Joyce v. Adams*, 8 N. Y. 291; *Straus v. Ross*, 25 Ind. 300; *Lingham v. Eggleston*, 27 Mich. 324; *Jones v. Pearce*, 25 Ark. 545; *Galloway v. Week*, 54 Wis. 608-9; *McDonald v. Hewett*, 15 Johns. 349; 8 Am. Dec. 241.

⁹ *Brown v. Childs*, 2 Duv. 314; *The Venus*, 8 Cranch, 275; *Suit v. Woodhall*, 113 Mass. 391; *Sneathen v. Grubbs*, 88 Pa. St. 147; *Devine v. Edwards*, 101 Ill. 138.

¹⁰ *Lynch v. O'Donnell*, 127 Mass. 311; *Terry v. Wheeler*, 25 N. Y. 520; *Dyer v. Libby*, 61 Me. 45; *Underhill v. Boom Co.*,

ing or weighing is requisite to ascertain the price, yet if this is not by the agreement devolved on the seller, but the whole are actually delivered to the buyer without counting, measuring or weighing, title passes immediately, and the seller may afterwards recover the price upon such ascertainment by the buyer or by himself. It is merely a question of intention.¹¹ So although manual delivery is made, with something still to be done to ascertain the price, and this to be done by the buyer, yet the contract may be so explicit as to indicate that title does not pass until that is done.¹²

3 So the buyer, by the terms of the contract, is to

40 Mich. 660 ; *Pike v. Vaughan*, 39 Wis. 499 ; *Mt. Hope Iron Co. v. Buffinton*, 103 Mass. 62.

¹¹ "Title to personal property, passes by delivery, although there remains something to be done to ascertain the value at the agreed rates, unless by the terms of the contract this was to be done before delivery." *Burrows v. Whitaker*, 71 N. Y. 291 ; 27 Am. Rep. 42. See to same effect, *Riddle v. Varnum*, 20 Pick. 280 ; *Scott v. Wells*, 6 Watts & S. 357 ; 40 Am. Dec. 568 ; *Adams' Mining Co. v. Senter*, 26 Mich. 74 ; *Cunningham v. Ashbrook*, 20 Mo. 553 ; *Southw. F. Co. v. Stanard*, 44 Mo. 71 ; *Crofoot v. Bennett*, 2 N. Y. 268 ; *Allen v. Maury*, 66 Ala. 10 ; *Kaufman v. Stone*, 25 Ark. 337 ; *Upson v. Holmes*, 51 Conn. 500 ; *Seckell v. Scott*, 66 Ill. 106 ; *Odell v. B. & M. R. Co.*, 109 Mass. 50 ; *Barr v. Borthwick*, 19 Oreg. 578 ; *Farmers' Phosphate Co. v. Gill*, 69 Md. 548 ; *Baldwin v. Doubleday*, 59 Vt. 7 ; *Sahlman v. Mills*, 3 Strob. L. 385 ; 51 Am. Dec. 630 ; *Sedgwick v. Cottingham*, 54 Iowa, 512 ; *Haxall v. Willis*, 15 Gratt, 434 ; *Morrow v. Reed*, 30 Wis. 81 ; *Morgan v. Perkins*, 1 Jones, 171 ; *Martin v. Hurlbut*, 9 Minn. 142.

¹² *Ward v. Shaw*, 7 Wend. 404 (cattle to be slaughtered and weighed by purchaser) ; *Pfistner v. Bird*, 43 Mich. 14 (pine trees to be "cut, hauled, and scaled" by buyer from seller's land).

pay before delivery, title does not pass by delivery until payment; and so of any other condition precedent to be fulfilled by the purchaser; unless the circumstances evince a waiver; and such a condition is not fraudulent as to creditors.¹³

When the condition of prepayment is *express*, no title passes to the purchaser until payment,¹⁴ and on principle he can confer none on others¹⁵ (although this point has been much debated).

Where the condition of prepayment is only *implied*

¹³ *Prentiss Tool, etc., Co. v. Schirmer*, 136 N. Y. 305; 32 Am. St. Rep. 737.

¹⁴ *Barrett v. Pritchard*, 2 Pick. 512; 13 Am. Dec. 449; *Singer Manuf. Co. v. Cole*, 4 Lea, 439; 40 Am. Rep. 20.

¹⁵ *Coggill v. Hartford, etc., R. Co.*, 3 Gray, 545; *Rogers v. Whitehouse*, 71 Me. 222; *Stone v. Waite*, 88 Ala. 604; *Sumner v. Woods*, 67 Ala. 139; 42 Am. Rep. 104; *Zuchtmann v. Roberts*, 109 Mass. 53; 12 Am. Rep. 663; *Gayden v. Tufts*, 68 Miss. 691. This subject is regulated by statute in some States,—as Maine, Vermont, and Iowa,—and recently in New York. The doctrine of the text prevails everywhere in this country, it is believed, except in Pennsylvania (see *Stadtfield v. Huntsman*, 92 Penn. St. 53; 37 Am. Rep. 661; and see note, 37 Am. Rep. 664), and possibly Illinois, Kentucky, Maryland. In his very learned and exhaustive note (Benj. Sales, 6th Am. ed., p. 285, etc.) Mr. Burnett arrays the decisions by States, and shows this to be the doctrine in Massachusetts, Missouri, Arkansas, California, Connecticut, Georgia, Indiana, Iowa, Ohio, Oregon, New Hampshire, Michigan, Maine, Vermont, Alabama, Delaware, Florida, Kansas, Nebraska, Nevada, New Jersey, North Carolina, Ohio, Rhode Island, South Carolina, Tennessee, Texas, Virginia, the Federal courts and Canada. The subject was formally in some debate in New York, but probably the general rule was favored by the later decisions. (See notes, 37 Am. Rep. 564; 3 Am. St. Rep. 198; also *Prentiss Tool Co. v. Schirmer*, 136 N. Y. 305; 32 Am. St. Rep. 737; *Harkness v. Russell*, 118 U. S. 678.)

the rule is certainly the same as between the parties,¹⁶ and probably as to persons claiming under the purchaser.¹⁷

What amounts to *waiver* of such a condition is frequently a delicate question. The check or note of the buyer does not operate as payment unless paid.¹⁸ But it has been held in some States that in the absence of an express reservation, delivery on a sale made simply "for cash" is *prima facie* at least a waiver of prepayment as to third parties.¹⁹ When the seller on a conditional sale elects to pass the title, he cannot claim the benefit of any lien or incumbrance for any unpaid part of the purchase money.^{19a}

After delivery and before breach of such condition the seller may resell or his creditors may attach the goods, subject to the first buyer's right to fulfill, and retain them.²⁰ And so the buyer may sell before breach, and such sale will become valid on his fulfillment of the condition.²¹ The risk of loss by casualty while the goods are so in possession of the buyer is

¹⁶ *Fishback v. Van Dusen*, 33 Minn. 111 (see note, 33 Am. L. Reg. [N.S.] 506; *Empire State Type Co. v. Grant*, 114 N. Y. 40.)

¹⁷ *Nat. Bank v. Railroad Co.*, 44 Minn. 224.

¹⁸ *Ibid.*; *Davison v. Davis*, 125 U. S. 91.

¹⁹ *Scudder v. Bradbury*, 106 Mass. 422; *Hammett v. Linne-man*, 48 N. Y. 399; *Peabody v. Maguire*, 79 Me. 586.

^{19a} *Crompton v. Beach*, 62 Conn. 25; 18 Lawy. Ann. Rep. 187.

²⁰ *Burnell v. Marvin*, 44 Vt. 277; *Everett v. Hall*, 67 Me. 497; *McMillan v. Larned*, 41 Mich. 521.

²¹ *Day v. Bassett*, 102 Mass. 445; *Carpenter v. Scott*, 13 R. I. 477; *Dech's Appeal*, 57 Penn. St., 473.

on him.²² The seller cannot recover the property or its value from a subsequent purchaser who bought before breach of the condition.²³

In case of delivery to the buyer and his subsequent sale to another, and his breach of a condition precedent, the seller may recover the property or its value from the second buyer without any allowance for partial payments made by the original buyer;²⁴ and the original buyer cannot recover it from his vendor, at least at law whatever the case may be in equity.²⁵ But if the seller retakes the property he cannot enforce the buyer's note for any part of the price,²⁶ the consideration having failed.²⁷

If the buyer sells the property or it is attached after breach of the condition, no demand is necessary on the part of the original seller from the second

²² *Tufts v. Griffin*, 107 N. C. 49; 22 Am. St. Rep. 863; *Burnley v. Tufts*, 66 Miss. 49; 14 Am. St. Rep. 540; *Brewer v. Ford*, 54 Hun, 117. But see *Swallow v. Emery*, 111 Mass. 355, *contra*. See note, 22 Am. St. Rep. 866.

²³ *Newhall v. Kingsbury*, 131 Mass. 445; *Hurd v. Fleming*, 34 Vt. 169.

²⁴ *Colcord v. McDonald*, 128 Mass. 470; *Brown v. Haynes*, 52 Me. 578; *Sage v. Sleutz*, 23 Ohio St. 1; *Hughes v. Kelly*, 40 Conn. 148; *Porter v. Pettengill*, 12 N. H. 299; *Duke v. Shackelford*, 56 Miss. 552; *Fleck v. Warner*, 25 Kans. 492.

²⁵ *Latham v. Sumner*, 89 Ill. 233; 31 Am. Rep. 79; *Tufts v. D'Arcambal*, 85 Mich. 185; 24 Am. St. Rep. 79.

²⁶ *Preston v. Whitney*, 23 Mich. 267; *Ketchum v. Brennan*, 53 Miss. 596; *Hays v. Jordan*, 85 Ga. 750.

²⁷ *Hine v. Roberts*, 48 Conn. 267; 40 Am. Rep. 170; *Loomis v. Bragg*, 50 Conn. 228; 47 Am. Rep. 638; *Third Nat. Bk. v. Armstrong*, 25 Minn. 530.

buyer or the creditor, because the taking was wrongful;²⁸ and so as to the original buyer.²⁹

Conflict of Laws. — An interesting question sometimes arises as to whether the *lex loci contractus* or the *lex fori* governs in respect to a conditional sale. Thus, where one residing in New Jersey buys chattels conditionally in Pennsylvania, and the property is shipped to him in New Jersey, and he does not fulfil the condition, but there sells the chattels to a citizen of New Jersey, it is held that the original seller may recover them,³⁰ contrary to the law of Pennsylvania, on the ground that the second buyer got only his vendor's title. But where a piano was conditionally sold in Michigan, the condition being there effectual against all parties, and was removed to Illinois and there mortgaged, the original seller was allowed to recover it, contrary to the law of Illinois.³¹

An important exception to the general law above stated as to conditional sales is sometimes made in the case of sales for resale. For example, it has been held that where a wholesale dealer sells wagons upon credit to a retail dealer, for the apparent and implied purpose of resale, a condition that the title shall remain in the seller until the purchase price is paid is fraudulent and void as against an innocent pur-

²⁸ *Whitney v. McConnell*, 29 Mich. 12; *Hill v. Freeman*, 3 Cush. 257; *Stone v. Perry*, 60 Me. 48.

²⁹ *Salomon v. Hathaway*, 126 Mass. 482.

³⁰ *Marvin Safe Co. v. Morton*, 48 N. J. L. 412; 57 Am. Rep. 566.

³¹ *Waters v. Cox*, 2 Bradw. 129.

chaser from the buyer,³² not so, however, as to creditors of the buyer.³³

³² *Winchester Wagon Works, etc., Co. v. Carman*, 100 Ind. 31; 58 Am. Rep. 382. Sustained by *Fitzgerald v. Fuller*, 19 Hun, 180; *Ludden v. Hazen*, 31 Barb. 650; *Rogers v. Whitehouse*, 71 Me. 222; *Armington v. Houston*, 38 Vt. 448; *Leigh v. Mobile, etc., Co.*, 58 Ala. 165. *Contra*: *Sargent v. Metcalf*, 5 Gray, 306; 66 Am. Dec. 368.

³³ *Lewis v. McCabe*, 49 Conn. 141; *Forbes v. Marsh*, 15 Conn. 384; *Armington v. Houston*, 38 Vt. 448. Thus in *Winchester Wagon Works, etc. v. Carman*, *supra*, the court said: "In such case the purposes for which the possession of the property was delivered to the original vendee are inconsistent with the continued ownership thereof by the original vendor, and for this reason the condition upon which the sale and delivery were made must be deemed fraudulent and void as against purchasers from the original vendee of the property." Title in such a case would not pass to the buyer's assignee in insolvency. *Rogers v. Whitehouse*, *supra*; *Burbank v. Crooker*, 7 Gray, 158; 66 Am. Dec. 470. In New York however such a transaction is held fraudulent and void as against both creditors and purchasers. *Ludden v. Hazen*, *supra*; *Powell v. Preston*, 1 Hun, 513.

CHAPTER II.

SALE OF CHATTEL NOT SPECIFIC.

ON sale of an article *to be manufactured*, no title passes until it is completed, and notice thereof is given to the purchaser,¹ or it is "appropriated" for the buyer by the seller, by being set apart, marked, or in some other way designated as his property.²

In the case of a sale of a portion of a larger quantity, the American authorities differ widely, sometimes even in the same State, as to whether appropriation, by separation, designation, or identification, by the seller, is requisite to pass the title. Some cases hold that such appropriation is necessary in all instances, while others hold it unnecessary where the mass is uniform in kind and quality, and it is the intention of the parties that title should pass before separation. Some of this latter class of cases admit the soundness of the English doctrine, that

¹ *Nat. Bank v. Crowley*, 24 Mich. 492 ; *Ballentine v. Robinson*, 46 Pa. St. 177 ; *Moline Scale Co. v. Beed*, 52 Iowa, 307 ; 35 Am. Rep. 272 ; *Butler v. Butler*, 77 N. Y. 472 ; 33 Am. Rep. 648.

² *Bancher v. Warren*, 33 N. H. 183 ; *Randolph Iron Co., v. Elliott*, 34 N. J. L. 184 ; *Higgins v. Del., etc., R. Co.*, 60 N. Y. 553 ; *Winslow v. Leonard*, 24 Pa. St. 14 ; *Moss v. Meshew*, 8 Bush. 187 ; *Ormsbee v. Machir*, 20 Ohio St. 295 ; *Lewis v. Lofley*, 60 Ga. 559.

title does not pass without separation where the gross bulk is various in kind and quality.³

Most of the cases seem to regard the question as one of law, but others hold it a question of intention, at least where the mass is uniform in kind and quality, to be left to the jury.⁴

³ That appropriation is not necessary to pass title is more or less directly held in *Damon v. Osborn*, 1 Pick. 476 ; 11 Am. Dec. 229 ; *Weld v. Cutler*, 2 Gray, 195 ; *Pleasants v. Pendleton*, 6 Rand. 473 ; 18 Am. Dec. 726 ; *Crofoot v. Bennett*, 2 N. Y. 258 ; *Kimberley v. Patchin*, 19 N. Y. 330 ; 75 Am. Dec. 334 ; *Russell v. Carrington*, 42 N. Y. 118 ; 1 Am. Rep. 498 ; *Sanger v. Waterbury*, 116 N. Y. 371 ; *Waldron v. Chase*, 37 Me. 414 ; 59 Am. Dec. 56 ; *Horr v. Barker*, 11 Cal. 393 ; 70 Am. Dec. 791 ; *Watts v. Hendry*, 13 Fla. 523 ; *Chapman v. Shepard*, 39 Conn. 413 ; *Lamprey v. Sargent*, 58 N. H. 241 ; *Carpenter v. Graham*, 42 Mich. 191 ; *Kaufmann v. Schilling*, 58 Mo. 218 ; *Young v. Miles*, 20 Wis. 615 ; 23 Id. 643 ; *Nash v. Brewster*, 39 Minn. 533 ; *Piazzek v. White*, 23 Kans. 621 ; 33 Am. Rep. 211 ; *Newhall v. Langdon*, 39 Ohio St. 87 ; 48 Am. Rep. 426. More or less directly opposed to these are *Brewer v. Smith*, 3 Greenl. 44 ; 14 Am. Dec. 213 ; *Young v. Austin*, 6 Pick. 280 ; *Scudder v. Worster*, 11 Cush. 573 ; *Merrill v. Hunnewell*, 13 Pick. 213 ; *Keeler v. Goodwin*, 111 Mass. 490 ; *Woods v. McGee*, 7 Ohio, 127 ; 30 Am. Dec. 220 ; *Dunlap v. Berry*, 4 Scam. 327 ; *Hutchinson v. Hunter*, 7 Pa. St. 140 ; *Foot v. Marsh*, 51 N. Y. 288 ; *Stevens v. Eno*, 10 Barb. 95 ; *Waldo v. Belcher*, 11 Ired. 609 ; *Gardiner v. Suydam*, 7 N. Y. 357 ; *Cook v. Logan*, 7 Iowa, 142 ; *Courtright v. Leonard*, 11 Id. 32 ; *Bailey v. Smith*, 43 N. H. 141 ; *McLaughlin v. Piatti*, 27 Cal. 463 ; *Haldeman v. Duncan*, 51 Pa. St. 66 ; *Browning v. Hamilton*, 42 Ala. 484 ; *Baldwin v. McKay*, 41 Miss. 358 ; *Upham v. Dodd*, 24 Ark. 545 ; *Morrison v. Dingley*, 63 Me. 553 ; *Hahn v. Fredericks*, 30 Mich. 223 ; 18 Am. Rep. 119 ; *Huntington v. Chisholm*, 61 Ga. 270 ; *Ferguson v. Northern Bank*, 14 Bush. 555 ; 29 Am. Rep. 418 ; *Block v. Maas*, 65 Ala. 211 ; *Com. Bank v. Gillette*, 90 Ind. 268 ; 46 Am. Rep. 222 ; *Fitzpatrick v. Fain*, 3 Cold. 15 ; *Hubler v. Gaston*, 9 Oreg. 66 ; 42 Am. Rep. 794.

⁴ *Lamprey v. Sargent*, 58 N. H. 241 ; *Graff v. Fitch*, 58 Ill. 373 ; 11 Am. Rep. 85, and note, 90 ; *Rodee v. Wade*, 47

It may be considered however as settled, that if the whole quantity is delivered to the purchaser, and he is to make the separation, title passes by such delivery.³

The solution of this question most frequently arises when the mass has been destroyed by casualty or the claims of intervening creditors or purchasers are asserted.

The correct principle would seem to be that where the thing sold is certain in kind and quantity, title should be deemed to pass by the sale, in the absence of proof of a contrary intention; and this would apply even though the subject of the sale were a certain number or weight or measure of one uniform mass, of which it formed an unseparated part. It is difficult to understand the necessity of separation, for example, in case of the sale of a thousand bushels of oats from a bin of ten thousand, or of one hundred barrels of flour from one thousand, all precisely alike, or of one hundred bedsteads from two hundred, all of the same kind and pattern, and all of the same price. Separation in such a case would seem an unmeaning form. In case of a mass of different kinds or quali-

Barb. 53; *Hurff v. Hires*, 39 N. J. L. 4; 40 Id. 581; 29 Am. Rep. 382; *Phillips v. Ocmulgee Mills*, 55 Ga. 634. See *Smith v. Friend*, 15 Cal. 124. All the foregoing cases, with many more, on this vexed point, are carefully arrayed and compared by Mr. Bennett (*Benj. Sales*, 6th ed., notes, pp. 299, 300), and he concludes that title does not pass until separation. In this he is opposed to Mr. Ralston's recent monograph. See a valuable note by Judge O. W. HOLMES, Jr., 6 Am. L. Rev. (N. S.) 450.

ties, and the sale of a portion of certain kinds or qualities therefrom, there is more reason for the rule that separation is essential, because the thing sold is not definite to the senses, however much it may be theoretically by the agreement, as to price and kind and quality, because the seller may mean one thing and the buyer another. It seems to the writer that the correct rule would be to regard the question as purely one of intention, and that in all cases of doubt this should be a question of fact. "The rule that the property in goods will pass by the contract of sale, if such be the intention of the parties, is of the utmost importance in the transaction of the business of the country, and it ought not to be qualified by exceptions and reservations which do not arise from the substantial interests of the parties."⁵ It would seem a reasonable statement and rule laid down by a very eminent judge, and perhaps correctly derived at the date of that decision (1859), that "none of the decisions announce the extreme doctrine that where in such cases the parties expressly declare an intention to change the title, there is any legal impossibility in the way of that design." If this cannot be done, "then the reason must be that two men cannot be owners of separate quantities or proportions of an undistinguishable mass. That conclusion would be a naked absurdity." "None of them go to the extent of holding that a man cannot, if he wishes and in-

⁵ *Hurff v. Hires*, 39 N. J. L. 4; 40 Id. 581; 29 Am. Rep. 282; *Cloke v. Shafroth*, 137 Ill. 393; 31 Am. St. Rep. 375.

tends so to do, make a perfect sale of part of a quantity, without actual separation, where the mass is ascertained by the contract, and all parts are of the same value and undistinguishable from each other.”⁶

It is conceded that in case of a voluntary mingling by several owners of a mass of goods of the same kind and quality, as grain in an elevator, either may confer title to his specific portion without separation, and title is sufficiently passed by an order on the custodian, accepted by him.⁷ •

⁶ By COMSTOCK, J., in *Kimberly v. Patchin*, 19 N. Y. 330. Two judges, however, dissented ; and see criticisms on this doctrine and case in *Elgee Cotton Cases*, 22 Wall. 180. This extremely nice and interesting question is thus discussed in *Hurff v. Hires*, 40 N. J. L. 581 ; 29 Am. Rep. 282 ; in the court of errors and appeals :

“The question whether the property has passed under a contract of sale has generally arisen where the right of an unpaid vendor is in the issue. Payment of the price is so essential an ingredient of a sale that neither in law nor in morals is the buyer entitled to have the goods until he pays for them. The lien of the vendor is waived where payment is to be made at a future day, or there has been a delivery actual, and in some cases merely constructive ; hence the inclination of the courts to hold, on slight circumstances, that the contract is so incomplete that a transfer of title was not intended where the delivery is constructive only, and the insolvency of the buyer has intervened with the contract price unpaid. Prominent also among the cases in the same direction are those in which the right of the purchaser to object to the quality of the article, which is the subject-matter of the contract of sale, is involved. Here also there is an inclination to hold the title to be in abeyance, if any well-grounded objection to quality is apparent. A contract for the delivery of goods, merely of a particular description, is necessarily executory : and where it relates to a certain quantity from a large bulk, not uniform in quality or value, the transaction is so incomplete that until selection, and not mere separation, is made, the rights of the parties respectively are undefined. In cases like those mentioned, it is con-

sidered, for substantial reasons, that the title does not pass immediately upon the terms of the contract being agreed on ; not that these cases create exceptions to the rule that the property will pass by the contract if such be the intention of the parties, but the circumstances are such, and of such weight, that it is presumed that it was not the intention of the parties that the sale should be complete."

"The tendency of the modern decisions is to give effect to contracts of sale according to the intention of the parties, to a greater extent than is found in the older cases, and to engraft upon the rule that the property passes by the contract of sale, if such be the intention, fewer exceptions, and those only which are founded on substantial considerations affecting the interests of parties. At one time, it was held, that under an agreement to purchase an entire bulk at a specified price, the property did not pass if the whole amount of the purchase-money depended upon an ascertainment by weight or measurement subsequently to be made. *Hanson v. Meyer*, 6 East, 614. This decision was made in favor of an unpaid vendor, and was afterward distinguished, on the ground that the weighing was to be done by the seller, and it was held that the property would pass if such was the intention of parties, though something was to be done, such as weighing, measuring, or testing the goods to ascertain the contract price, if what remained to be done was to be done by the buyer. *Turley v. Bates*, 2 H. & C. 200. This distinction was adopted in *Boswell v. Green*, 1 Dutch. 390. Still later, the English courts entirely repudiated this distinction and held, in cases where the weighing was to be done by the seller, the property would pass, though the ultimate contract price was to be ascertained by a subsequent weighing, if the parties so intended ; and Chief Justice COCKBURN, in his opinion, said that 'it is equally clear, that in point of principle and in point of common sense, there is nothing to prevent a man from passing the property to the thing he proposes to sell and the buyer proposes to buy, although the price may remain to be ascertained afterward.' *Martineau v. Kitching*, L. R., 7 Q. B. 436 ; *Castle v. Playford*, L. R., 7 Ex. 98. It may now be considered as the law of the English courts, that where the contract price has been paid or advances made on it, the property will pass to the buyer, according to the intention of the parties, although something remains to be done by the seller to complete the goods, in conformity with the contract, before they are ready to be delivered. *Young v. Matthews*, L. R., 2 C. P. 127 ; *Langton v. Waring*, 18 C. B. (N. S.) 315.

“That the parties contemplated the corn should be measured before it left the vendor’s possession, will not of itself prevent the property passing. Nor will the fact that the vendor was required to deliver it when the time for delivery arrived, accomplish that result. Where the goods sold have been selected and designated, and the price paid, the property will pass by the contract of sale, though it was one of the terms of the contract that the vendor should transport them to a place named for delivery. *Terry v. Wheeler*, 25 N. Y. 520. The case therefore must stand exclusively on the fact that no separation of the quantity sold had been made from the entire bulk before the execution was levied, and the question is, whether there is a rule of law requiring, under the circumstances of this case, a separation of the quantity sold from the larger bulk, before title will pass to the purchaser, so positive in its sanction as to overrule the intention of the parties.

“It is undoubtedly the doctrine of the English courts, that ‘where there is bargain for a certain quantity *ex* a greater quantity, and there is a power of selection in the vendor to deliver which he thinks fit, there the right to them does not pass to the vendee until the vendor has made his selection.’ Per BAYLEY, B., *Gillett v. Hill*, 2 C. & M. 530. This doctrine is founded on correct principles, where the gross bulk is variable in kind or quality, and this selection from it of that part which shall be delivered is of benefit to the vendor. It has been applied to a sale of a specified quantity, from a larger bulk of a uniform kind and value, where the purchaser had seen the goods in bulk and approved of it. *Aldridge v. Johnson*, 7 E. & B. 885.

“In my judgment, this principle should not be applied where the bulk, from which the quantity purchased is to be separated, is uniform in kind and quality, and has been approved by the purchaser, and the full contract price has been paid. There is a clear and well-settled legal distinction between the individual rights of several parties in goods of uniform kind and quality, and in those in which there is no uniformity in these respects.

“In Virginia, New York, Connecticut and Maine the courts have held the broad doctrine, without qualification, that on a contract of sale of a certain quantity from a larger bulk, uniform in kind and quality, the property will pass, though there be no separation of the quantity sold, if such be the intention of parties, and that no rule of law will overrule such intention if it be otherwise clearly expressed. *Pleasants v. Pendleton*, 6 Randolph, 473; *Kimberly v. Patchin*, 19 N. Y. 330;

Russell v. Carrington, 42 Id. 118 : s. c., 1 Am. Rep. 498 ; Chapman v. Shepard, 39 Conn. 413 ; Waldron v. Chase, 37 Me. 414.

"The doctrine held in these cases, it seems to me, is founded on good sense and correct legal principles."

The contrary doctrine is nowhere better enunciated on principle than in *Ferguson v. Northern Bank of Kentucky*, 14 Bush. 555 ; 29 Am. Rep. 418, where the court said :

"While the sale of a specific chattel passes the property to the vendee, although no delivery is made, the doctrine established by all the elementary writers on the subject, and we believe without an exception, is, that where the subject-matter of the sale is in bulk, and a certain quantity is sold, to be taken from a greater quantity, no title passes until the separation is made. Benj. on Sales ; Long on Sales ; Blackb. on Sales : Chit. on Cont. ; Comyn on Cont.

"The English cases sustain the doctrine laid down in the text-books with scarcely an exception. In the case of *Whitehouse v. Frost*, 12 East, 614, it was held that a sale of ten tons of oil in a cistern containing forty tons passed the title to the vendee, and this case, says Mr. Benjamin in his work on sales, 'notwithstanding the explanation by judges in subsequent cases, is scarcely ever mentioned without suggestion of doubt or disapproval.'

"The question is thus clearly stated by BAYLEY, J., in the case of *Gillett v. Hill*, 2 C. & M. 530 : 'If I agree to deliver a certain quantity of oil, as ten out of eighteen tons, no one can say which part of the whole quantity I have agreed to deliver until a selection is made. There is no individuality until it has been divided.' The innovation on the rule of the common law has been made by the courts of this country. The leading case of *Kimberly v. Patchin*, 19 N. Y. 330, adverse to this doctrine, or rather its reasoning, has been followed by subsequent decisions, until it may be said there is much conflict in the American authorities on the question.

"In that case A. had six thousand two hundred and forty-nine bushels of wheat in bulk, and sold B. six thousand bushels, and gave him a warehouse receipt for the quantity without weighing or separation. After this A. sold all the wheat to C., who took possession. B. instituted an action of trover against C., and it was held, two of the judges dissenting, that title and right of recovery of the six thousand bushels had passed to B. The case of *Pleasants v. Pendleton*, 6 Rand. 473, decided in the year 1823, has been cited as a strong case in support of *Kimberly v. Patchin* ; but on an examination of that case it will be

found that not one of the barrels of flour in the warehouse was branded like the one hundred and nineteen barrels claimed by the plaintiff, and it was there expressly held that the subject of the bargain was so designated as to be clearly distinguishable.

“In *Kimberly v. Patchin*, the whole quantity of wheat in the two bulks was estimated at six thousand bushels, but upon measurement there turned out to be more, and the fact that the vendor thought he was selling all, and its near approach to the entire quantity, may have to some extent influenced the judgment of the court in making C. liable for the conversion.

“The inquiry is made by the learned judge in that case, ‘*Is it possible in reason and in law (a quantity of wheat being in store) for one man to own a given portion of it and for another man to own the residue, without a separation of the parts?*’

“If A. owned the entire bulk and sold six thousand bushels to B., and the residue to C., more or less, intending to pass the title, and expressing that intention in plain words, what would have been the result? The former owner most certainly would have parted with all his title. Again, suppose A. has in store two hundred and fifty bushels of grain, and B. deposits with him six thousand bushels merely on storage, and the grain is mixed by agreement? This would be a case of confusion of property where neither would lose his title.

“The concession made by the learned judge in the attempt to distinguish between the sale of a chattel that may be distinguished by the description given, such as a horse of a particular size and color, and the sale of a lot of grain in bulk, where each constituent particle composing the quantity cannot be identified, is a sufficient response to the inquiry made. It is said in the opinion in the attempt to make the distinction, that ‘No person can be said to own a horse or a picture, unless he is able to identify the chattel or specify what horse or what picture it is that belongs to him.’ Suppose that A., being the owner of ten horses, then in his pasture, sells to B. two of the choice animals, and the residue to C., and expressing his intention, at the time, of passing the title, why will not the title pass as in the sale of the wheat? It is conceded that no title passes, because the right of selection exists, although the intention to pass the title may have been expressed. The horses are all in the pasture from which the two may be taken, and so is the wheat in the bulk from which the six thousand bushels can be separated. It may be impossible to identify each partic-

ular grain of a large mass of wheat, and although the subject of the contract is ascertained, still separation must be made before the title passes. A sale of five gallons of oil to be taken from a barrel containing a larger quantity, or of fifty bushels of wheat to be delivered out of a bulk of one thousand bushels, passes no title until separation.

“If Dickinson, the original owner of the six thousand two hundred and forty bushels of wheat, the subject of controversy in *Kimberly v. Patchin*, had sold one hundred bushels of the wheat, and five thousand had been destroyed, can it be maintained that the purchaser of the one hundred bushels must bear his proportion of the loss? or if he had sold one thousand bushels of the wheat to A. without actual delivery, and afterward had sold and delivered to six others the entire bulk of wheat in lots of one thousand bushels each, who of the purchasers would have A.’s one thousand bushels? The question can only be answered by adhering to the legal and philosophical rule on the subject, that no title passes to A. for the want of separation, and that the subsequent purchasers were the real owners. The bulk of wheat out of which the smaller quantity is to be taken is ascertained, and the lot of horses out of which the two are to be selected is also ascertained, but the title to neither passes until the selection is made in the one case and separation takes place in the other. If the purchasers in the case of the wheat or horses should take possession and agree to hold without any division or separation, the title would pass, and they would hold as tenants in common, but not as the owners of a divided interest.

“Nor do we understand that the question of intention, if established or expressed in so many words, necessarily passes the title. The intention to pass title may exist, and still the facts not constitute a sale. This intention is manifested by the nature and character of the contract, the rules of law determining what constitutes a sale and what an agreement to sell; as, for instance, the sale of all the corn in a certain crib, or all the wheat in a certain bulk. It is immaterial to the parties what the quantity may be, the purchaser agrees to take all, and therefore the legal as well as logical conclusion is that the parties intended the title should pass. One, upon an existing agreement, or for a sufficient consideration, may agree to bear the loss if the property is destroyed, though no title passes, but in order to become the owner, he must be able to identify what he claims to own.

“One may acquire an interest in property owned by another by purchasing an interest in the whole, as the one-fifth, or the one-half of a given quantity of bacon or grain. He then becomes a tenant in common with an interest that affects the title to the whole. This illustrates the distinction between tenants in common and the interest acquired by the sale of a chattel or a sale of a quantity of grain to be delivered by the owner. To support an action of detinue or replevin, if the interests of the property wrongfully taken are separate and distinct, the parties cannot join, but must institute separate actions, and if joint tenants or tenants in common, they must join.”

¹ *Cushing v. Breed*, 14 Allen, 380 ; *Morrison v. Woodley*, 84 Ill. 192 ; *Warren v. Milliken*, 57 Me. 97.

CHAPTER III.

SUBSEQUENT APPROPRIATION.

AFTER an executory contract in reference to existing articles has been made, it may be converted into a complete bargain and sale by specifying the goods to which it is to attach. This is called "appropriation." This most commonly arises where the selection is to be made by the seller, and the test is that he does such an act as will estop him from changing his intention afterwards. The most usual form of this act is the delivery, and this may occur short of a delivery to the buyer himself, as, for example, to a carrier for delivery to the buyer. Delivery to a carrier in pursuance of the buyer's direction or of a general usage is such an appropriation as finally binds the seller and the buyer, vests the property in the buyer, and subjects him to risk of loss.¹ But other-

¹ *Krulder v. Ellison*, 47 N. Y. 36 ; 7 Am. Rep. 402 ; *Pacific Iron Works v. L. I. R. Co.*, 62 N. Y. 272 ; *Stanton v. Eager*, 16 Pick. 467 ; *Magruder v. Gage*, 33 Md. 344 ; 3 Am. Rep. 177 ; *Stafford v. Walter*, 67 Ill. 83 ; *Whiting v. Farrand*, 1 Conn. 60 ; *Ranney v. Higby*, 5 Wis. 62 ; *Wing v. Clark*, 24 Me. 366 ; *Schmertz v. Dwyer*, 53 Pa. St. 335 ; *Grove v. Brien*, 8 How. 434 ; *Ober v. Smith*, 78 N. C. 313 ; but not unless the goods correspond with the contract ; *Pierson v. Crooks*, 115 N. Y. 539 ; 12 Am. St. Rep. 831.

wise unless such delivery is by such direction or in accordance with such usage.² Such direction is implied where the buyer, living in another town, directs the seller "to send" him the goods.^{2a} If the sale is legal where made, such delivery vests the title, although illegal at the place of the buyer's residence, or *vice versâ*.³ To impose the risk on the buyer the direction of the goods must be reasonably correct.⁴ A delivery of a larger amount or much later than the order, unless accepted, will not bind the buyer,⁵ and so of a delivery of only part of the order, unless it comes to hand.⁶ The delivery must be to the carrier designated, if any.⁷

Sometimes it is a question of intention for the jury, whether title was to vest by such delivery or not till actual receipt.⁸

Where goods are shipped to a consignee under an agreement that he is to sell them and apply the proceeds to a debt of the consignor for previous advances, the consignee gets no lien as against a credi-

² *Hague v. Porter*, 3 Hill, 141; *Hanauer v. Bartels*, 2 Colo. 514.

^{2a} *Ramsey and Gore Manufacturing Co. v. Kelsen*, 55 N. J. L. 320.

³ *Orcutt v. Melson*, 1 Gray, 537; *Garland v. Lane*, 46 N. H. 245; *Frank v. Hoey*, 128 Mass. 263; *Sarbecker v. State*, 65 Wis. 173; 56 Am. Rep. 624.

⁴ *Woodruff v. Noyes*, 15 Conn. 335; *Garretson v. Selby*, 37 Iowa, 529; 18 Am. Rep. 14.

⁵ *Rommel v. Wingate*, 103 Mass. 327; *Larkin v. Mitchell Lumber Co.*, 42 Mich. 296.

⁶ *Bruce v. Pearson*, 3 Johns. 534; *Rochester Oil Co. v. Hughey*, 56 Pa. St. 322.

⁷ *Corning v. Colt*, 5 Wend. 254.

⁸ *Merch. Nat. Bk. v. Bangs*, 102 Mass. 291; *Straus v. Wessel*, 30 Ohio St. 211.

tor attaching before the shipping receipts were forwarded.⁹

Title to articles manufactured for a party, it is usually held, passes on completion, and delivery or tender,¹⁰ but some courts deem it essential that there should be some act of acceptance or acquiescence by the buyer, or his consent to a setting apart for him.¹¹

⁹ *Hodges v. Kimball*, 49 Iowa, 577; 31 Am. Rep. 158. And so, *Elliott v. Bradley*, 23 Vt. 217; *Bonner v. Marsh*, 10 Sm. & M. 376; 48 Am. Dec. 754; *Saunders v. Bartlett*, 12 Heisk. 316.

¹⁰ *Bement v. Smith*, 15 Wend. 493; *Ballentine v. Robinson*, 46 Pa. St. 177; *Shawhan v. Van Nest*, 25 Ohio St. 490; 18 Am. Rep. 313; *Mt. Hope Iron Co. v. Buffinton*, 103 Mass. 62; *Spicers v. Harvey*, 9 R. I. 582; *McIntyre v. Kine*, 30 Miss. 361; *Gordon v. Norris*, 49 N. H. 376.

¹¹ *Moody v. Brown*, 34 Me. 107; 56 Am. Dec. 640; *Rider v. Kelley*, 32 Vt. 268; 76 Am. Dec. 176. In the former case the court said: "To effect a change in the property, there must be an assent of both parties. It is admitted that the mere order given for the manufacture of the article does not affect the title. It will continue to be the property of the manufacturer until completed and tendered. There is no assent of the other party to a change of the title exhibited by a tender and refusal. There must be proof of an acceptance, or of acts or words respecting it, from which an acceptance may be inferred, to pass the property." The same principle was declared in the latter case, where the contract was for the sale of hops to be raised, of a certain quality, the court observing, "the article must not only be made and offered to the vendee, but he must accept of it, or it must be set apart for him by his consent, before the title will vest in him."

CHAPTER IV.

RESERVATION OF THE *JUS DISPONENDI*.

ALTHOUGH delivery of the goods to a carrier for transmission to the buyer, at his request, express or implied, ordinarily passes the title, yet the seller may avoid this result; for example, by the common course of taking a bill of lading in his own favor. Usually this is construed as a reservation of the title, but some cases incline to the view that it is not conclusive, and is subject to explanation.¹ The question is one of intention. "If the bill of lading shows that the consignment was made for the benefit of the consignor or his order, it is very strong proof of his intention to reserve the *jus disponendi*. And on the other hand, if the bill of lading shows that the shipment was made for the benefit of the consignee, it is almost decisive of the consignor's intention to part with the ownership of the property. We have no doubt however that if the bill of lading shows a consignment by vendor to vendee, and no other circumstances appear as to the

¹ The *San José Indiano*, 1 Wheat. 208; *Merchants' Bank v. Bangs*, 102 Mass. 291; *Farmers & Mech. Bank v. Logan*, 74 N. Y. 568; *Hobart v. Littlefield*, 13 R. I. 341; *Emery v. Irving Nat. Bank*, 25 Ohio St. 360; 18 Am. Rep. 299; *Berger v. State*, 50 Ark. 20; *Bergeman v. Ind., etc., R. Co.*, 104 Mo. 77.

intention, it will be taken as *prima facie* evidence of an unconditional delivery to the vendee."²

If the bill of lading is transferred by a third person in whose favor it runs before the property comes into the buyer's possession, title passes to that transferee.³

But the transferee of the bill of lading is not protected unless he took it in good faith and in the belief that title had passed. So under a cash sale of several car loads of wheat for which a worthless check is given, the delivery of the bill of lading by the vendor does not pass the title to the purchaser, or to a bank to which the purchaser is indebted, which receives a draft in payment therefor in favor of the purchaser, and applies it to its account, having notice that the sale is for cash and that the purchase money has not been paid.^{3a}

Where the shipment is made "C. O. D.," the buyer to pay the freight, the question whether title or only possession is reserved has been variously decided. The weight of authority seems to favor the doctrine that title passes by the delivery to the carrier.⁴ This

² *Emery v. Irving Nat. Bk.*, *supra*.

³ *Bank of Rochester v. Jones*, 4 N. Y. 497; 55 Am. Dec. 290; *First Nat. Bank v. Bayley*, 115 Mass. 228; *Mich. Cent. R. Co. v. Phillips*, 60 Ill. 190; *Schumacher v. Eby*, 24 Pa. St. 521.

^{3a} *Johnson-Brinkham Co. v. Cent. Bank*, Mo. 22 S. W. Rep. 943.

⁴ *Norfolk R. Co. v. Barnes*, 104 N. C. 25; *State v. Carl*, 43 Ark. 353; 51 Am. Rep. 565; *State v. Intox. Liquors*, 73 Me. 278; *Pilgreen v. State*, 71 Ala. 368. *Contra*: *State v. O'Neil*, 58 Vt. 140; 56 Am. Rep. 556 (on appeal to the U. S. Sup. Court the case went off on another point); *Baker v. Bourcicault*, 1

interesting question arises where a sale is made in one State, and is legal there, for delivery in another State, where it would be illegal; as of intoxicating liquors. In spite of this inclination of the scale, the

Daly, 23; *People v. Shriver*, 31 Alb. L. J. 163. *Higgins v. Murray*, 73 N. Y. 352, sometimes cited to the doctrine that title passes on delivery to the carrier, "C. O. D.," does not go to that extent, for as the court say, that action was "not strictly for the sale of the article manufactured, but for work, labor and materials, performed, and used in its manufacture," and so the question of title was not in the case. Moreover the court cited *Baker v. Bourcicault*, *supra*, without disapproval. In *Pilgreen v. State*, 71 Ala. 368, the court said: "Upon all sales of specific goods in the possession of the vendor, the contract is complete when the buyer and seller agree; the property in the goods then passes to the buyer, and the risk of loss by accident, or from any other cause than the fault or negligence of the seller, is cast upon the buyer as an incident of ownership, though actual possession may not pass, and he may not be entitled to it until he pays the price, or performs some other like stipulation. 1 Pars. Cont. (6th ed.) 525. An illustration given in some of the books is, 'If a man sell his horse for money, though he may keep him until he is paid, yet the property of the horse is in the bargainer or buyer.' When buyer and seller are distant from each other, the delivery of the goods to a carrier by the seller, in accordance with the specific request of the purchaser, is a delivery to the purchaser. 1 Pars. Cont. (6th ed.) 532; *Benj. Sales* (3d Am. ed.), sec. 181. Applying these settled rules of the law of sales of personal property to the facts, the transaction cannot be located at Columbiana. All the dealings between the buyer and the seller were at Calera. There the offer of the buyer was received, accepted and acted upon, and there every act was done which it was intended the seller should do. The general property in the thing sold there passed to the buyer, by the delivery to the carrier of his own appointment, though he could not entitle himself to possession until he paid the price to the carrier. The carrier was his agent to receive the thing sold at Calera, and was the agent of the seller to receive the price. It would have been a neglect of duty, as a collecting agent, rendering the express company liable to the seller, if there had been a delivery of the whisky

writer can hardly conceive a more explicit indication of the seller's intention not to part with the title than his consignment "C. O. D." The argument, in some of the cases, that the seller constitutes the carrier his

without payment of the price; and if possession had been wrongfully obtained, it may be, the seller could have reclaimed it. The general property, however, passed to the buyer by the delivery to the express company at Calera; the risk of loss then passed to him; though there may have remained in the seller a special property, and though the buyer could not, without the payment of the price, entitle himself to the absolute property and to the actual possession. 'In law,' as is observed by Mr. Benjamin, 'a thing may in some cases be said to have in a certain sense two owners, one of whom has the general, and the other a special property in it.' *Benj. Sales*, Sec. 1. And this occurs in sales of personal property, when the bargain is struck, and the payment of the price is intended to be simultaneous with the delivery of possession. The seller has a lien on the property for the price, and the right of possession until it is paid. A sale, which will be in violation of the statute under which the conviction was had, must, within the designated locality, pass the title; a sale made in a different locality, where the liquor is set apart and delivered to the purchaser, or to a carrier for him, passing title, is not within its words or spirit. *Garbracht v. Commonwealth*, 96 Penn. St. 449; 42 Am. Rep. 550."

In *State v. O'Neil*, 58 Vt. 140; 56 Am. Rep. 556, the opposing doctrine was thus expressed by the court: "Attached to the very body of the contract, and to the act of delivery to the carrier, was the condition of payment before delivery of possession to the consignee. With this condition unfulfilled and not waived, it would be impossible to say that a delivery to the carrier was intended by the consignor as a delivery to the consignee, or as a surrender of the legal title. The goods were intrusted to the carrier to transport to the place of destination named, there to present them for acceptance to the consignee, and if he accepted them and paid the accompanying invoice and the transportation charges, to deliver them to him; otherwise, to notify the consignor and hold them subject to his order. It is difficult to see how a seller could more positively and unequivocally express his intention not to relinquish his

agent to transfer possession rather than title, seems begging the question. Certainly if the seller is so ignorant or distrustful of the buyer's responsibility as to be unwilling to confer *possession* on him without

right of property or possession in goods until payment of the purchase-price than by this method of shipment. We do not think the case is distinguishable in principle from that of a vendor who sends his clerk or agent to deliver the goods, or forwards them to, or makes them deliverable upon the order of his agent, with instructions not to deliver them except on payment of the price, or performance of some other specified condition precedent by the vendee. The vendors made the express company their agent in the matter of the delivery of the goods, with instructions not to part with the possession of them except upon prior or contemporaneous receipt of the price. The contract of sale therefore remained inchoate or executory while the goods were in transit, or in the hands of the express company, and could only become executed and complete by their delivery to the consignee. There was a completed executory contract of sale in New York ; but the completed sale was, or was to be, in this State. In *People v. Shriver*, 31 Alb. L. J. 63, TREAT, J., says in the opinion : ' In the case of liquor shipped by the defendant to Fairfield by express, C. O. D., the liquor is received by the express company at Shawneetown as the agent of the seller, and not as the agent of the buyer, and on its reaching Fairfield it is there held by the company, as the agent of the seller, until the consignee comes and pays the money, and then the company, as the agent of the seller, delivers the liquor to the purchaser. In such case the possession of the express company is the possession of the seller, and generally the right of property remains in the seller until the payment of the price. An order from a person in Fairfield to the defendant at Shawneetown for two gallons of liquor, to be shipped to Fairfield, C. O. D., is a mere offer by the person sending such order to purchase two gallons of liquor from the defendant, and pay him for it when he delivers it to him at Fairfield, and a shipment by the defendant according to such order is practically the same as if the defendant had himself taken two gallons of liquor from his store in Shawneetown, carried it in person to Fairfield, and there delivered it to the purchaser, and received the price of it. It would be different if the order from

accompanying payment, it would be a violent presumption to suppose that nevertheless he was willing to trust him with the *title* without payment, and thus possibly tie up the ownership for a season.

The buyer has no right to the possession, of course, until he pays the price.⁵

Fairfield to the defendant was a simple order to ship two gallons of liquor by express to the person ordering, whether such order was accompanied by the money or not. The moment the liquor under such an order was delivered to the express company at Shawneetown it would become the property of the person ordering, and the possession of the express company at Shawneetown would be the possession of the purchaser, the sale would be a sale at Shawneetown, and if it were lost or destroyed in transit the loss would fall upon the purchaser. But in the case at bar the shipping of the liquor to Fairfield, C. O. D., the defendant made no sale at Shawneetown; the right of property remained in himself, and the right of possession, as well as the actual possession, remained in him through his agent. Had it been lost or destroyed in transit the loss would have fallen on himself. He simply acted upon the request of the purchaser, and sent the liquor to Fairfield by his own agent, and there effected a sale by receiving the money and delivering the liquor.' "

⁵ Lane v. Chadwick, 146 Mass. 68.

PART IV.

AVOIDANCE OF THE CONTRACT.

CHAPTER I.

MISTAKE AND FAILURE OF CONSIDERATION.

Mistake.—A party to a sale may refuse to execute it, or having executed, may rescind it, on account of a material mistake as to the subject of the sale, the price, or sometimes the identity of the other party, provided he restores the latter to his original standing. So if the article in question may be of value to the other party, he must return it before he can recover back the amount;¹ but not so if the article is of no possible value,² or where the buyer has used it up.³

¹ *Kimball v. Cunningham*, 4 Mass. 502; 3 Am. Dec. 230; *Bishop v. Stewart*, 13 Nev. 41; *Cook v. Gilman*, 34 N. H. 560; *Vance v. Schroyer*, 79 Ind. 380; *Tisdale v. Buckmore*, 33 Me. 461; *Fay v. Oliver*, 20 Vt. 118; 49 Am. Dec. 764; *Fuller v. Hubbard*, 6 Cow. 13; 16 Am. Dec. 423.

² *Brewster v. Burnett*, 125 Mass. 68; 28 Am. Rep. 203 (a purchase of counterfeit bonds); *Mahone v. Reeves*, 11 Ala. 345; *Sanford v. Dodd*, 2 Day, 437; *Smith v. Smith*, 30 Vt. 139; *Dill v. O'Ferrell*, 45 Ind. 268.

³ *Pac. Guano Co. v. Mullen*, 66 Ala. 582. In *Wood v. Boynton*, 64 Wis. 265; 54 Am. Rep. 610, a rough diamond worth \$700 was sold for \$1, in mutual good faith and ignorance of its value. Held, that the seller could not rescind.

The mistake must be mutual, and not merely a misunderstanding on one side alone.⁴

It may be said, as a general rule, that the mistake must be one of fact and not of law.⁵ But this statement must be received with some allowance. It undoubtedly applies to the consequences of ignorance of the *general law* of the land; but where parties contract under a mutual mistake and misapprehension as to their relative and respective rights, or the doubtful construction of an evidence of title, for example, the mistake is remediable. For example, if they contracted under a mutual understanding that the seller owned the entire article of sale, whereas he was only part owner, in a legal view, this would be a mistake of law against which equity would afford relief to the buyer, and so where the contract itself, owing to a mutual misapprehension of the law, failed to express the real understanding of the parties.

Failure of consideration arises where the subject of sale has no valid existence,⁶ or the article is law-

⁴ Benj. Sales, 56, *et seq.*; Browne Parol Ev., p. 79, etc.; 2 Pom. Eq. Jur., 2d ed. §§ 845, 846, 849.

⁵ Benj. Cont. §§ 4, 7.

⁶ Wood v. Sheldon, 42 N. J. L. 421; 36 Am. Rep. 523 (certificate of dividend illegally issued); Thrall v. Newell, 19 Vt. 208 (note made by a lunatic); Thomas v. Knowles, 128 Mass. 22; Terry v. Bissell, 26 Conn. 23; Aldrich v. Jackson, 5 R. I. 218 (forged note); Dumont v. Williamson, 18 Ohio St. 515; 98 Am. Dec. 186 (forged note). So of a void patent; Dickinson v. Hall, 14 Pick. 217; 25 Am. Dec. 390; but not where merely unadapted to the purpose designed; Palmer's Appeal, 96 Pa. St. 106.

fully taken from the buyer by the seller's creditors,⁷ or by the seller himself under a reserved right.⁸ But if the buyer gets exactly what he bargained for, its worthlessness is no defense.⁹ On an entire executed sale, part failure of consideration does not warrant partial rescission.¹⁰

⁷ *Bailey v. Foster*, 9 Pick. 141.

⁸ *Minneapolis Harvester Works v. Hally*, 27 Minn. 495.

⁹ *Bryant v. Pember*, 45 Vt. 487.

¹⁰ *Miner v. Bradley*, 22 Pick. 457.

CHAPTER II.

FRAUD.

It is a well recognized principle that deleterious fraud renders all contracts voidable, and this principle applies in the law of sales. But serious difficulty often arises in defining fraud, and determining the line between such deceit as may vitiate the contract and such as is tolerated of practical necessity in a commercial world. The law allows for mere puffery of one's wares on the one hand, and for roseate views of one's responsibility on the other, when they stop short of intentional deceit.

1. *Fraud on the Seller*.—This may consist in fraudulent and injurious misstatements as to the amount, condition or character of the buyer's property or business, or as to his debts.¹ So of false statements as to his identity, occupation, agency or connection with a

¹Cary v. Hotaling, 1 Hill, 311; 37 Am. Rep. 323; Eaton v. Avery, 83 N. Y. 31; Gregory v. Schoenell, 55 Ind. 101; Reid v. Cowduroy, 79 Iowa, 169; 18 Am. St. Rep. 359, and note, 362; Newell v. Randall, 32 Minn. 171; 50 Am. Rep. 562 (concealment of fact that buyer owed two-thirds of his capital).

firm,² or as to his being of age.³ So of a payment in counterfeit money.⁴ So of a false statement that he has just bought similar goods at a lower price.⁵

It is not essential that the statements should be direct or in person. So if made to a commercial agency and intended to be communicated, and actually communicated, to the seller, this is enough.⁶

The intention and expectation to pay for the goods will not cure such fraudulent misrepresentations.^{6a}

In all these cases it is essential that the seller should have relied on and been injured by the false and fraudulent statement, and that the question is only between the original parties.

Intention not to pay.—If the buyer purchases with the present intention not to pay, and does not pay,

² *Barker v. Dinsmore*, 72 Pa. St. 427; 13 Am. Rep. 697; *Aborn v. Merch. Desp. Co.*, 135 Mass. 283; *McCrillis v. Allen*, 57 Vt. 505; *Alexander v. Swackhamer*, 105 Ind. 81; 55 Am. Rep. 150; *Rodliff v. Dallinger*, 141 Mass. 1; 55 Am. Rep. 439; *Des Farges v. Pugh*, 93 N. C. 31; 53 Am. Rep. 446; (where the buyer represented himself as a "mayor"); *Higler v. People*, 44 Mich. 299; 38 Am. Rep. 267 (where the buyer represented himself as a "storekeeper"); *Hamet v. Letcher*, 37 Ohio St. 356; 41 Am. Rep. 519.

³ *Badger v. Phinney*, 15 Mass. 359; 8 Am. Dec. 105.

⁴ *Williams v. Given*, 6 Gratt. 268; *Green v. Humphry*, 50 Penn. St. 212.

⁵ *Smith v. Countryman*, 30 N. Y. 655 (one judge assenting reluctantly and three dissenting). The court observed: "The credulity of the defendant furnished but a poor excuse for the falsehood and fraud of the plaintiff," following *Van Epps v. Harrison*, 5 Hill, 63; 40 Am. Dec. 314.

⁶ *Eaton v. Avery*, 83 N. Y. 31; *Robinson v. Levi*, 81 Ala. 135; *Mooney v. Davis*, 75 Mich. 188; 13 Am. St. Rep. 425.

^{6a} *Judd v. Weber*, 55 Conn. 267.

the sale may be avoided on proof of this alone if no third party has acquired an interest.⁷ Some of the cases treat the lack of a reasonable expectation of being able to pay as equivalent to an intent not to pay. But mere knowledge of insolvency and of doubtful ability to pay will not avoid the contract, although concealed from the seller.⁸

⁷ *Hennequin v. Naylor*, 24 N. Y. 139; *Donaldson v. Farwell*, 93 U. S. 631; *Stewart v. Emerson*, 52 N. H. 301; *Farwell v. Hanchett*, 120 Ill. 573; *Slagle v. Goodnow*, 48 N. W. Rep. 402; *Ross v. Miner*, 35 N. W. Rep. 60; *Burrill v. Stevens*, 73 Me. 395; 40 Am. Rep. 366; *Mulliken v. Millar*, 12 R. I. 297; *Powell v. Bradlee*, 9 G. & J. 220; *Fox v. Webster*, 46 Mo. 181; *Oswego Starch Factory v. Lendrum*, 57 Iowa, 573; 42 Am. Rep. 53; *Loeb v. Flash*, 65 Ala. 526; *Shipman v. Seymour*, 40 Mich. 275; *Des Farges v. Pugh*, 93 N. C. 31; 53 Am. Rep. 446; *Brower v. Goodyer*, 88 Ind. 572; *Belding v. Frankland*, 8 Lea, 67; 41 Am. Rep. 630; *Dow v. Sanborn*, 3 Allen, 181. In *Spira v. Hornthall*, 77 Ala. 137, the court said: "Though of comparatively modern origin, the doctrine is now firmly grafted on the jurisprudence of both England and this country, that a vendor, induced by misrepresentation, or fraudulent concealment, to sell goods to a purchaser *who is insolvent, and has no intention to pay for them*, may disaffirm the sale and reclaim the goods, as against the fraudulent vendee, or any person claiming under him with notice of the fraud. The rule is founded on the requirements of honest and fair dealing; and as said by STONE, J., 'is a growth upward in commercial morals.' It rests on the fundamental principle that no person can in good conscience be allowed to take and retain the property of another, without paying the consideration price, or without a *bona fide* intention, at the time of purchase, to pay for it." On the other hand, it has been sometimes considered that mere concealment of insolvency is not fraudulent. *Bell v. Ellis*, 33 Cal. 620; *Wilson v. White*, 80 N. C. 280. In Pennsylvania it is held that such mere intention is not enough; but it must be accompanied by some "artifice intended and fitted to deceive." *Rodman v. Thalheimer*, 75 Pa. St. 232; *Talcott v. Henderson*, 31 Ohio St. 162; 27 Am. Rep. 501, and note, 504.

⁸ *Talcott v. Henderson*, *supra*; *Cross v. Peters*, 1 Greenl. 378;

In the absence of confidential relations, artifice or deception, the buyer is not bound to disclose facts known to him and unknown to the seller, which, if known to the latter, would enhance the price.⁹ But if he intentionally misleads on this point, it is otherwise.¹⁰

Auction sales.—It is fraudulent to prevent or dissuade, or combine to prevent others from bidding,¹¹ at auction, but one may lawfully buy for several on an agreement for division.¹²

Ratification.—But the seller may waive the fraud and ratify the sale, upon full knowledge of the fraud. As by bringing an action for the price,¹³ or probably by bringing an action for damages by the fraud,¹⁴ or

10 Am. Dec. 78; *Hotchkin v. Third Nat. Bk.*, 127 N. Y. 330; *Garbutt v. Bank*, 22 Wis. 384; *Bidault v. Wales*, 20 Mo. 547; 64 Am. Dec. 205; *Morrill v. Blackman*, 42 Conn. 324; *Kelsey v. Harrison*, 29 Kans. 143; *Thompson v. Peck*, 115 Ind. 513; *Dalton v. Thurston*, 15 R. I. 418; 2 Am. St. Rep. 905.

⁹ *Laidlaw v. Organ*, 2 Wheat. 178 (knowledge of a treaty); *Harris v. Tyson*, 24 Pa. St. 347; 64 Am. Dec. 661; *Smith v. Beatty*, 2 Ired. Eq. 456; 40 Am. Dec. 435; *Burns v. Mahannah*, 39 Kans. 87; *Pennybacker v. Laidley*, 33 W. Va. 623; *Matthews v. Bliss*, 22 Pick. 48.

¹⁰ *Bench v. Sheldon*, 14 Barb. 66.

¹¹ *Cocks v. Izard*, 7 Wall. 559; *Jackson v. Morter*, 82 Pa. St. 291.

¹² *Kearney v. Taylor*, 15 How. 521; *Phippen v. Stickney*, 3 Metc. 387.

¹³ *Butler v. Hildreth*, 5 Met. 49; *Emma Min. Co. v. Emma Co.*, 7 Fed. Rep. 421; *Bulckley v. Morgan*, 46 Conn. 393. But a judgment for the price, in ignorance of the fraud, will not prevent rescission. *Kraus v. Thompson*, 30 Minn. 64; 44 Am. Rep. 182.

¹⁴ *Kimball v. Cunningham*, 4 Mass. 502; 3 Am. Dec. 230; *Bacon v. Brown*, 1 Bibb. 334; 4 Am. Dec. 640.

by taking security for the price,¹⁵ or proving his claim for the price in bankruptcy.¹⁶

Election.—Having elected whether to avoid or ratify, the seller is bound by his choice,¹⁷ but if he rescinds and recovers only part of the goods he may sue for the balance of the price.¹⁸

Avoidance.—The seller may, within a reasonable time, avoid the fraudulent sale by replevin of the goods or trover for their value without demand.¹⁹ Or he may retake them himself if he can do so without violence.^{19a} But he cannot maintain assumpsit unless the goods have been converted into money or money's worth.^{19b} And he must return any of the consideration which he has received.²⁰

¹⁵ *Joslin v. Cowee*, 52 N. Y. 90.

¹⁶ *Seavey v. Potter*, 121 Mass. 297; *Roan v. Winn*, 93 Mo. 504.

¹⁷ *Moller v. Tuska*, 87 N. Y. 166; *Pence v. Langdon*, 99 U. S. 582.

¹⁸ *Powers v. Benedict*, 88 N. Y. 605; *Sleeper v. Davis*, 64 N. H. 59. *Contra*: *Farwell v. Myers*, 59 Mich. 179.

¹⁹ *Seaver v. Dingley*, 4 Greenl. 306; *Farwell v. Hanchett*, 120 Ill. 573; *Thurston v. Blanchard*, 22 Pick. 18; 33 Am. Dec. 700. *Contra*: as to demand, *Pangborn v. Ruemenapp*, 74 Mich. 572.

^{19a} *Hodgeden v. Hubbard*, 18 Vt. 504; 46 Am. Dec. 167.

^{19b} *Kellogg v. Turpie*, 93 Ill. 265; 34 Am. Rep. 163.

²⁰ *Kimball v. Cunningham*, 4 Mass. 502; 3 Am. Dec. 230; *Baker v. Robbins*, 2 Denio, 136; *Weed v. Page*, 7 Wis. 503. This is undoubtedly the general rule. "The rule is elementary that a party cannot rescind a contract for fraud without acting promptly on its discovery, and restoring whatever has been received upon it. *Masson v. Bovet*, 1 Denio, 69." *Lee v. Vacuum Oil Co.*, 126 N. Y. 579, 586. On the other hand, in *Sisson v. Hill* (R. I.), 21 Lawy. Rep. Ann. 206, it was held that the return of money received on a contract of sale induced by fraud is not a condition precedent to the commencement of a suit in replevin

But he need not return the buyer's own note until the trial.²¹

If the seller chooses to ratify, it has been held that he cannot sue for the price until the agreed term of

for the property, but the court can require plaintiff to repay as a condition of relief any excess of money received over the damage to his property and the value of any that is not recovered. In an excellent note, the editor says that this decision "is far in advance of the doctrine generally maintained on this question," referring to note to *Tarkington v. Purvis* (Ind.), 9 Lawy. Rep. Ann. 607, and continuing: "And the weight of authority is that the contract must be rescinded before replevin will lie which makes a return or offer to return a condition precedent to the bringing of the action. *Parrish v. Thurston*, 87 Ind. 437; *Thompson v. Peck*, 115 Ind. 512; *Matteawan Co. v. Bentley*, 13 Barb. 641; *Weed v. Page*, 7 Wis. 511; *Farwell v. Hanchett*, 19 Ill. App. 620." The court in *Sisson v. Hill*, concede that "there are undoubtedly numerous cases that support" the contrary doctrine, but they observe: "Two reasons have been stated for the rule. One is the protection of the vendee. With reference to this it may be said, that while the substantial rights of the fraudulent person who is proceeded against should undoubtedly be preserved, the person who has been deprived of his property by fraud under the guise of a contract of sale ought not to be defeated, delayed, or embarrassed by technicalities or useless ceremonies. The fraudulent vendee is in no position to demand anything more than protection that the vendor, at the same time that he obtains justice, shall do justice. A return or tender of the consideration, especially when it consists merely of money or promissory notes or like securities, before the bringing of the suit, is not necessary to the protection of the vendee, since the court in which the action is pending can compel such return, so far as may be necessary to do justice to the vendee, by making it a condition of its judgment, or by withholding its judgment, or staying execution on it, until a compliance with its order for such return.

"The other reason, and perhaps the one more frequently assigned, for the rule, is purely technical. It is that the vendor cannot rescind the contract and retain the money, because he cannot rescind it in part and affirm it in part, but must rescind

²¹ *Nichols v. Michael*, 23 N. Y. 264.

credit has expired. That is put on the ground that he may not ratify in part and avoid in part.²²

in toto, if at all. Chief Justice DUFFEE, in *Warner v. Vallily*, above, clearly shows how fallacious is this reason when applied to cases of the avoidance of contracts of sale on the ground of fraud. He says: 'It is here assumed that the vendor, if he keeps the money, can only keep it in part fulfillment of the contract. But is it necessarily so? The position of the vendor is that he has been swindled out of his goods under the guise of a contract, the contract and the money paid on it being a part of the artifice or contrivance by which the fraud was consummated. He keeps the money, not as part fulfillment of the contract, but as part indemnity for the fraud which has been perpetrated on him, intending to deduct it in his action. The question is, Will the law permit him to do so? Will it allow him to keep as indemnity what he received as consideration? We do not see why it will not, for *ex hypothesi* he was deceived into receiving it as consideration by the vendee, and therefore came under no obligation to him to keep it as such, nor still less to return it before bringing suit for the tort. The vendee, considering his fraud, gets all, if not more than, he merits, when he is allowed a deduction *pro tanto* in damages.'

"In accordance with these views it has been held that in cases in which the vendor has received from the fraudulent vendee moneys as a part of the consideration, and in which he sues in trover for the recovery of pecuniary damages for the conversion of the goods obtained by the fraud, he may retain the money, and allow it to go in reduction of the damages to be recovered. *Warner v. Vallily*, 13 R. I. 483; *Ladd v. Moore*, 3 Sandf. 589. So too it has been held in numerous cases in which the plaintiffs have sued in trover, that when the fraudulent vendee has given his note, or even the note or other obligation of a third person, as the consideration, in whole or in part, for the goods obtained, it is not necessary for the vendor to return, or offer to return, such note or obligation before suit, but that it is enough if he bring it into court to be impounded at the trial

²² *Kellogg v. Turpie*, 93 Ill. 265; 34 Am. Rep. 163; *Adler v. Fenton*, 24 How. 407; *Dellone v. Hull*, 47 Md. 112; *Allen v. Ford*, 19 Pick. 217. *Contra*: *Roth v. Palmer*, 27 Barb. 652; *Wigand v. Sichel*, 3 Keyes, 120; *Mann v. Stowell*, 3 Chand. 243.

Rights of third parties.—The general rule undoubtedly is that the fraudulent purchaser may confer valid title on an innocent purchaser for value. Although

for the benefit or protection of the vendee. *Duval v. Mowry*, 6 R. I. 479; *Thurston v. Blanchard*, 22 Pick. 18; 33 Am. Dec. 700; *Frost v. Lowry*, 15 Ohio, 200; *Nellis v. Bradley*, 1 Sandf. 560; *Ladd v. Moore*, *supra*; *Coghill v. Boring*, 15 Cal. 213.

“Why should not the same reasons apply to an action of replevin as have been applied to an action of trover, and which have led the courts to except it from the operation of the rule requiring that the consideration received by a vendor, if consisting of money or promissory notes or like securities, be returned or tendered before suit? A vendor cannot know before the service of his writ of replevin how many of the goods which have been fraudulently obtained from him can be recovered. Why should he not be permitted to retain the money or securities which he has received as an indemnity for the loss sustained by the fraud? Why should he be required, especially in a case like the one at bar, to surrender the money in his hands, and take the chances of recovering it again in an action of trover from the fraudulent vendee. ‘A bird in hand is worth two in the bush.’ The \$50 in cash which the plaintiffs have, may be worth more to them than a judgment for many times that sum against the defendant. As has been stated, all that the defendant is entitled to is protection, and the court can afford him that by requiring the plaintiff to pay into the court for the benefit of the defendant whatever sum, if any, the plaintiff has received in excess of the value of the goods disposed of by the defendant prior to the service of the writ of replevin, either before rendering judgment, or by staying execution, until a compliance with its order for such payment. We are aware that in *Wheaton v. Baker*, 14 Barb. 594, the court makes a distinction, in this respect, between an action of trover and an action of replevin; and this distinction was recognized in our own case of *Warner v. Vallily*, above, but we fail to perceive any just ground for the distinction, at least in a case like the present. In *Poor v. Woodburn*, 25 Vt. 234, 239, which was replevin for goods procured by purchase through fraudulent misrepresentations of the purchaser as to the value of the note of a third person given in payment for them, no tender of the note was made before the action. Chief Justice REDFIELD remarks: ‘The party who would rescind a contract of this kind must, no doubt,

the seller has been defrauded, yet having put it in the power of the buyer to sell the goods, the seller, rather than the innocent second buyer, must suffer.²³ But this doctrine does not prevail unless there was a valid contract outside the question of fraud, and the seller intended to sell to the very purchaser. If one of

be in a condition to put the other party *in statu quo*. If for instance he had parted with the note, he could not regain the property, even when he proved the most unequivocal fraud. And upon the trial he should, if required so to do by the opposite party, furnish the note, to be disposed of under the direction of the court.' And see also *Nichols v. Michael*, 23 N. Y. 264, which was an action under the Code, substituted for the former action of replevin, to recover possession of goods alleged to have been fraudulently obtained, and in which the vendee had given his negotiable promissory note for the goods. It was held that the vendor was not bound to tender such note at the time of rescinding the contract, but that it was sufficient for him to produce it at the trial, and place it in the custody of the court. And see also, *Schoonmaker v. Kelly*, 42 Hun, 299, in which the plaintiffs were allowed to maintain replevin for goods fraudulently obtained from them on tendering at the trial to the defendant, who was the general assignee for the benefit of creditors of the fraudulent vendee, the balance of the money paid by the vendee, after deducting the value of the goods disposed of by the vendee before the replevy and the depreciation in value of the goods replevied."

²³ *Easter v. Allen*, 8 Allen, 7; *Devoe v. Brandt*, 53 N. Y. 462; *Neal v. Williams*, 18 Me. 391; *LeGrand v. Nat. Bank*, 81 Ala. 123; 60 Am. Rep. 140; *Lynch v. Beecher*, 38 Conn. 490; *Ohio, etc., R. Co. v. Kerr*, 49 Ill. 458; *Bell v. Cafferty*, 21 Ind. 411; *Arnett v. Cloudas*, 4 Dana, 299; *Powell v. Bradley*, 9 G. & J. 278; *Cochran v. Stewart*, 21 Minn. 435; *Lee v. Portwood*, 41 Miss. 109; *Wineland v. Coonce*, 5 Mo. 296; 32 Am. Dec. 320; *Comey v. Pickering*, 63 N. H. 127; *Sinclair v. Healy*, 40 Pa. St. 417; 80 Am. Dec. 589; *Arendale v. Morgan*, 5 Sneed, 703; *Williams v. Given*, 6 Gratt. 268; *Singer Manuf. Co. v. Sammons*, 49 Wis. 316. In New York the second purchaser is not protected unless he has parted with money; *Partridge v. Rubin*, 15 Daly, 344. See *Eaton v. Davidson*, 46 Ohio St. 355.

the supposed parties is lacking, for example, there is no agreement, no matter how the sale was brought about. So if the sale was induced to one by the fraudulent representation that he was another, there is no contract at all: "One of the formal constituents of a legal transaction is wanting," the transaction is void from the beginning, and the buyer gets no title that he can confer on another. The first seller has not put it into the power of the first buyer to deceive the second buyer.²⁴

Who are not purchasers.—Such are attaching creditors of the fraudulent purchaser,²⁵ a pledgee holding as security only for a pre-existing debt,²⁶ attaching creditors getting the goods by voluntary delivery and not by judicial seizure,²⁷ an assignee in insolvency,²⁸ or for the benefit of creditors.^{28a}

²⁴ *Rodliff v. Dallinger*, 141 Mass. 1; 55 Am. Rep. 439; *Barker v. Dinsmore*, 72 Pa. St. 427; 13 Am. Rep. 697; *Peters Box Co. v. Lesh*, 119 Ind. 98; *McCrillis v. Allen*, 57 Vt. 505.

²⁵ *Henderson v. Gibbs*, 39 Kans. 684; *Atwood v. Dearborn*, 1 Allen, 483; 79 Am. Dec. 755; *Jordan v. Parker*, 56 Me. 557; *Bradley v. Obear*, 10 N. H. 477; *Thompson v. Rose*, 16 Conn. 71; 41 Am. Dec. 121; *Oswego Starch Factory v. Lendrum*, 57 Iowa, 573; 42 Am. Rep. 53; *Sleeper v. Davis*, 64 N. H. 61; 10 Am. St. Rep. 377.

²⁶ *Goodwin v. Mass. Loan Co.*, 152 Mass. 199.

²⁷ *Barnard v. Campbell*, 58 N. Y. 73; 17 Am. Rep. 208; *McGraw v. Solomon*, 83 Mich. 442; *Poor v. Woodburn*, 25 Vt. 235; *Pope v. Pope*, 40 Miss. 516; *Sargent v. Sturm*, 23 Cal. 359; 83 Am. Dec. 118; *Hyde v. Ellery*, 18 Md. 501. *Contra*: *Titcomb v. Wood*, 38 Me. 561; *Butters v. Haughwout*, 42 Ill. 18; 89 Am. Dec. 401; *Shufeldt v. Pease*, 16 Wis. 659.

²⁸ *Donaldson v. Farwell*, 93 U. S. 631; *Ratcliffe v. Sangston*,

^{28a} *Farley v. Lincoln*, 51 N. H. 577; 12 Am. Rep. 182.

2. *Fraud on the buyer.*—To constitute a legal fraud on the buyer there must be an actual intent to deceive. Legal fraud cannot coexist with honest belief, and the latter is a defense to a charge of fraud.²⁹ But this intent is inferable from the seller's knowledge of the falsity of his statement.³⁰ So if the seller makes statements which he does not know to be true, and which are false, this is fraud.³¹

But there is no legal fraud unless there is a false and fraudulent statement as to some material fact, as distinguished from a mere alleged opinion or belief or a recommendation. The former is legally fraudulent, the latter are not. Thus a deceptive and false statement that a farm last year produced a certain quantity of hay would be fraudulent,³² but a mere statement that the farm would produce such a quantity would not be fraudulent, being only an apparent opinion or recommendation, the correctness of which the buyer should test for himself. Among false state-

18 Md. 383; *Singer v. Schilling*, 74 Wis. 369; *Belding v. Frankland*, 8 Lea, 67; 41 Am. Rep. 630, and note, 633; *Bussing v. Rice*, 2 Cush. 48. See *Spira v. Hornthall*, 77 Ala. 137; *Hooser v. Hunt*, 65 Wis. 71.

²⁹ *Stone v. Denny*, 4 Metc. 151; *Binney's Appeal*, 116 Pa. St. 169; *Cowley v. Smyth*, 46 N. J. L. 380; *Lord v. Goddard*, 13 How. 198; *Young v. Covell*, 8 Johns. 23; 5 Am. Dec. 316.

³⁰ *Stewart v. Stearns*, 63 N. H. 99; 56 Am. Rep. 496; *O'Donnell v. Clinton*, 145 Mass. 462.

³¹ *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403; 9 Am. St. Rep. 727; *Beebe v. Knapp*, 28 Mich. 55; *Cabot v. Christie*, 42 Vt. 121; 1 Am. Rep. 313; *Bower v. Fenn*, 90 Pa. St. 359; 35 Am. Rep. 662; *Ind., etc., R. Co. v. Tyng*, 63 N. Y. 653; *Smith v. Newton*, 59 Ga. 113; *Foard v. McComb*, 12 Bush, 723.

³² *Coon v. Atwell*, 46 N. H. 510.

ments legally fraudulent are representations as to ownership, incumbrances, amount due, former sales, cost, responsibility of makers of a note, actual current selling prices, collateral security, class of bonds, quantity, receipts or productiveness of business.³³

Some cases allow a greater latitude for "dealers' talk," on the ground that a certain amount of puffery must be expected and guarded against by the buyer. *Caveat auditor* should be the maxim in such cases. False statements as to the cost of the article or the amount the seller had been offered, or as to the amount of a business for sale have been held venial.³⁴ And so as to the market price, in absence of special circumstances.³⁵

But it is agreed that mere expressions of opinion or recommendations, however false and deceptive, fall short of legal fraud,³⁶ especially where the seller had

³³ *Wardell v. Fosdick*, 13 Johns. 325; 7 Am. Dec. 383; *Case v. Hall*, 24 Wend. 102; 35 Am. Dec. 605; *Sibley v. Hulbert*, 15 Gray, 509; *Haight v. Hayt*, 19 N. Y. 464; *Crosland v. Hall*, 33 N. J. Eq. 111; *Alexander v. Dennis*, 9 Port. 174; 33 Am. Dec. 309; *Manning v. Albee*, 11 Allen, 520; *Deming v. Darling*, 148 Mass. 504; *Clark v. Edgar*, 84 Mo. 106; 54 Am. Rep. 84; *Lewis v. Jewell*, 151 Mass. 345; 21 Am. St. Rep. 454; *Cruess v. Fessler*, 39 Cal. 336; *Van Epps v. Harrison*, 5 Hill, 63; *Conlan v. Roemer*, 52 N. J. L. 53; *Kenner v. Harding*, 85 Ill. 264; 28 Am. Rep. 615.

³⁴ *Holbrook v. Connor*, 60 Me. 578; 11 Am. Rep. 212; *Poland v. Brownell*, 131 Mass. 138; 41 Am. Rep. 215; *Hauk v. Brownell*, 120 Ill. 161.

³⁵ *Graffenstein v. Eppstein*, 23 Kans. 443; 33 Am. Rep. 171.

³⁶ *Ellis v. Andrews*, 56 N. Y. 83; 15 Am. Rep. 379; and note, p. 382; *Homer v. Perkins*, 124 Mass. 431; 26 Am. Rep. 677; *Chrysler v. Canaday*, 90 N. Y. 272; 43 Am. Rep. 166; *Watts v.*

no superior means of knowledge and used no artifice to prevent inquiry by the buyer. Such would be a statement that a certain stock was worth eighty per cent. of its par value, although the seller knew it was worth only forty; or that the maker of a note was "perfectly good."

Sometimes it is doubtful whether a statement is one of fact or of mere opinion; as for example, that a horse is "sound and kind." In such cases the question is for the jury,³⁷ and generally the question whether the statement is one of fact or of opinion is for the jury.³⁸

Concealment of fact.—*Suppressio veri* is often as bad as *suggestio falsi*. An intentional concealment of material facts, undiscoverable by the purchaser, for the purpose of deception, is fraudulent. Such as hidden disease in an animal, or the fact that the article is not what it seems, or is mortgaged, or that an animal sold for breeding is impotent, or that the maker of a check is insolvent and his checks have gone to protest, or on a sale of a whisky trade-mark, the fact that the seller had impaired its value by manufacturing and putting on the market a large lot of inferior whisky.^{38a}

Cummins, 59 Pa. St. 84; Shade v. Creviston, 93 Ind. 591; Gordon v. Butler, 105 U. S. 553.

³⁷ Whitworth v. Thomas, 83 Ala. 308; 3 Am. St. Rep. 725; State v. Tomlin, 29 N. J. L. 13; Bigler v. Flickinger, 55 Pa. St. 279.

³⁸ Simar v. Canaday, 53 N. Y. 298; 13 Am. Rep. 523; Homer v. Perkins, 124 Mass. 431; 26 Am. Rep. 677.

^{38a} Paddock v. Strobridge, 29 Vt. 471; Cardwell v. McClelland, 3 Sneed, 150; Barron v. Alexander, 27 Mo. 530; Hough v.

Active artifice added to non-disclosure, as by telling only half the truth, increases the vice of the silent deception. As the confession that a balky horse had "balked once ;" or that the seller hitched a horse short to prevent his rubbing the saddle, whereas he knew the horse was a "cribber." And so of misstatements intended to mislead and throw the buyer off his guard and prevent inquiry into the facts.³⁹

Fraud by Agents.—The general rule is that in cases of sales by agents, dishonesty on the side of either the agent or the principal will enable the purchaser to rescind before payment or recover back the price paid. This rule differs in part from the English doctrine laid down in *Cornfoot v. Fowke*, 6 M. W. 358, where the principal knew of the falsity but the agent did not. But the distinction seems unjust to the suffering party, who is equally injured in either event by one or the other of the two who are legally one.⁴⁰ So if the buyer chooses to retain the property,

Evans, 4 McCord, 169 ; *Duvall v. Medtart*, 4 H. & J. 14 ; *Downing v. Dearborn*, 77 Me. 457 ; *Cornelius v. Molloy*, 7 Pa. St. 293 ; *Merritt v. Robinson*, 35 Ark. 483 ; *Maynard v. Maynard*, 49 Vt. 297 ; *Brown v. Montgomery*, 20 N. Y. 287 ; 75 Am. Dec. 404 ; *Dant v. Head*, 90 Ky. 255 ; 29 Am. St. Rep. 369. Somewhat to the contrary, *Beninger v. Corwin*, 24 N. J. L. 257 ; *Paul v. Hadley*, 23 Barb. 521.

³⁹ *Baker v. Seahorn*, 1 Swan, 54 ; 55 Am. Dec. 724 ; *Croyle v. Moses*, 90 Pa. St. 250 ; 35 Am. Rep. 654 ; *Nickley v. Thomas*, 22 Barb. 652 ; *Stewart v. Stearns*, 63 N. H. 99 ; 56 Am. Rep. 496.

⁴⁰ *Veazie v. Williams*, 8 How. 134 ; *Concord Bank v. Gregg*, 14 N. H. 331 ; *Jewett v. Carter*, 132 Mass. 335 ; *Lamm v. Port Dep. Ass'n*, 49 Md. 233 ; 33 Am. Rep. 246 ; *Sharp v. Mayor*, 40 Barb. 256 ; *Bergeman v. Ind., etc., R. Co.*, 104 Mo. 78.

he may maintain an action for deceit against the principal on account of the agent's fraud.⁴¹ And where the agent for selling wrongfully sells the property as his own to an innocent buyer for a fair price, the owner cannot recover the property from the latter.^{41a}

Auction Sales.—Any unfair means to enhance the bidding, whether by owner or auctioneer, are a fraud and render the sale voidable. Such are the announcements of fictitious bids, the employment of puffers, or secret signals, or a false statement of the ownership.⁴² It has been held that the owner may employ a by-bidder to prevent a sacrifice of the property,⁴³ but this result can be more honestly attained by putting the property to sale at an upset price. Combinations and arrangements to suppress bidding are unlawful.^{43a} The

⁴¹ *Locke v. Stearns*, 1 Met. 560; 35 Am. Dec. 383; *Fitzsimmons v. Joslin*, 21 Vt. 129; 52 Am. Dec. 46; Ind., etc., *R. Co. v. Tyng*, 63 N. Y. 653; *Durant v. Rogers*, 87 Ill. 511; *Tagg v. Tenn. Nat. Bank*, 9 Heisk. 479; *Law v. Grant*, 37 Wis. 548; *Wolfe v. Pugh*, 101 Ind. 294; *Reynolds v. Witte*, 13 S. C. 5; 36 Am. Rep. 678. *Contra*: unless the principal has understandingly affirmed the agent's fraud, *Kennedy v. McKay*, 43 N. J. L. 288; 39 Am. Rep. 581, a decision of the intermediate court, not citing a single American case.

^{41a} *Dias v. Chickering*, 64 Md. 348; 54 Am. Rep. 770.

⁴² *Veazie v. Williams*, 8 How. 134; *Peck v. List*, 23 W. Va. 338; 48 Am. Rep. 398; *Conover v. Walling*, 15 N. J. Eq. 173; *Thomas v. Kerr*, 3 Bush, 619; 96 Am. Dec. 262.

⁴³ *Reynolds v. Dechaums*, 24 Tex. 174; 76 Am. Dec. 101; *Latham v. Morrow*, 6 B. Mon. 630; *Jenkins v. Hogg*, 2 Const. 82.

^{43a} *Herndon v. Gibson* (S. C.), 17 S. E. Rep. 145. Here the Supreme Court held that where on a mortgage sale of lands a widow, dependent upon the property for her support, requested the bystanders not to bid against her, and she bought

auctioneer may reject an irresponsible bid.⁴⁴ The buyer must repudiate for fraud within a reasonable time.⁴⁵

Buyer's Remedies.—In case of a legal fraud the buyer may (1) rescind, return, refuse to pay or recover the payment ;⁴⁶ keep the property and set off the damage by the fraud against the price ;⁴⁷ (2) keep the property and sue for damages by the fraud ;⁴⁸ (3) sue to set aside the sale.⁴⁹

3. *Frauds on Creditors.*—Neither party to a sale can avoid it merely because it was designed as a fraud on creditors.⁵⁰ The seller must deliver and cannot regain the goods,⁵¹ and the buyer is bound to pay.⁵² The sale binds the seller's heirs or representatives.⁵³

If title is reserved until payment, or the buyer is permitted to manufacture and sell the goods, apply-

in the premises without opposition, the sale was void. It seems to have been differently held in *Woody v. Smith*, 65 N. C. 116, in the absence of proof that the auctioneer connived with the widow.

⁴⁴ *Den v. Zellers*, 7 N. J. L. 153 ; *Gray v. Veirs*, 33 Md. 18.

⁴⁵ *McDowell v. Simms*, Busbee Eq. 130 ; 57 Am. Dec. 595.

⁴⁶ *Perley v. Balch*, 33 Pick. 283 ; 34 Am. Dec. 56 ; *Burton v. Stewart*, 3 Wend. 236 ; 20 Am. Dec. 692.

⁴⁷ *Perley v. Balch*, *supra* ; *Foulk v. Eckert*, 61 Ill. 318.

⁴⁸ *Miller v. Barber*, 66 N. Y. 558.

⁴⁹ *Doggett v. Emerson*, 3 Story, 700.

⁵⁰ *Harvey v. Varney*, 98 Mass. 118 ; *Springer v. Drosch*, 32 Ind. 486 ; 2 Am. Rep. 356.

⁵¹ *Osborn v. Moss*, 7 Johns. 161 ; 5 Am. Dec. 252.

⁵² *Butler v. Moore*, 73 Me. 151 ; 40 Am. Rep. 348 ; *Gary v. Jacobson*, 55 Miss. 204 ; 30 Am. Rep. 514, and note, 517.

⁵³ *Drinkwater v. Drinkwater*, 4 Mass. 354.

ing the proceeds on the purchase price, this is not fraudulent as to creditors.^{53a}

At common law a debtor might in good faith pay one creditor in preference to others. The statute of Elizabeth, generally adopted in this country, pronounces void all conveyances, personal as well as real, made with intent "to delay, hinder or defraud creditors." This is construed as meaning a mutual intent. If the buyer is innocent of such intent, and gives value either presently or by the discharge of a precedent debt, his title is valid.⁵⁴ Even if he had reasonable ground to suspect such an intent in the seller, but did not participate,⁵⁵ and even if he knew that such was the seller's intent.⁵⁶ If the purpose was mutually fraudulent in the beginning, the purchaser may make his title good by renouncing his participancy and paying full value for the property.⁵⁷

^{53a} *Prentiss Tool, etc., Co. v. Schirmer*, 136 N. Y. 305 ; 32 Am. St. Rep. 737.

⁵⁴ *Bridge v. Eggleston*, 14 Mass. 245 ; 7 Am. Dec. 209 ; *Spring Lake Iron Co. v. Waters*, 50 Mich. 13 ; *Sexton v. Anderson*, 95 Mo. 373 ; *Hirsch v. Richardson*, 65 Miss. 227 ; *Hessing v. McCloskey*, 37 Ill. 341 ; *Dudley v. Danforth*, 61 N. Y. 626.

⁵⁵ *Carroll v. Hayward*, 124 Mass. 121 ; *Tuteur v. Chase*, 66 Miss. 476 ; *State v. Merritt*, 70 Mo. 275.

⁵⁶ *Dudley v. Danforth*, 61 N. Y. 626 ; *Shelley v. Boothe*, 73 Mo. 74 ; 39 Am. Rep. 481.

⁵⁷ *Bean v. Smith*, 2 Mason, 252 ; *Oriental Bank v. Haskins*, 3 Met. 332 ; 37 Am. Dec. 140 ; *Hutchins v. Sprague*, 4 N. H. 469 ; 17 Am. Dec. 439. *Contra* : *Merrill v. Meachum*, 5 Day, 341 ; *Roberts v. Anderson*, 3 Johns. Ch. 371. The former cases seem to have the better reason, for creditors are not injuriously affected by the transaction if the seller gets an equivalent for the property.

Change of possession.—By the language of the statutes, or where the statute is silent on the point, a want of “actual and continued change of possession” is regarded as a badge of fraud, more or less conclusive. Mr. Bennett says that three views seem to prevail in this country on this subject: (1) that continued possession, use and apparent ownership in the seller is a conclusive badge of fraud as a rule of law; (2) that it is only *prima facie* so as a rule of law; (3) that it makes a question of fact for the jury. These conclusions, he corroborates by a classification of the different adjudications by States, to which the student may usefully be referred.⁵⁸ Mr. Benjamin states the American doctrine as follows: “The modern English doctrine was approved by the Supreme Court of the United States as long ago as 1857, in *Warner v. Norton*, 20 How. 448, where McLEAN, J., said (p. 460): ‘Few questions in the law have given rise to a greater conflict in the law than the one under consideration. But for many years past the tendency has been, in England and the United States, to consider the question of fraud as a fact for the jury under the instructions of the court. And the weight of authority seems to be now, in this country, favorable to this position. Where possession of the goods does not accompany the deed, it is *prima facie* fraudulent, but open to the circumstances of the transaction, which may have an innocent purpose.’”⁵⁹

⁵⁸ Benj. Sales, 6th Am. ed., Bennett's Notes, pp. 458-462.

⁵⁹ Benj. Sales, 6th Am. ed. § 489. To this effect, *Brooks v.*

"*Creditors*" may be existing or subsequent. If a sale is made with actual and mutual intent to defraud existing creditors, it may be avoided also by subsequent creditors.⁶⁰ The term "creditors" includes claimants for tort or under statute.⁶¹

Subsequent purchasers for value from the same seller are protected in such circumstances.⁶²

A fraudulent purchaser, before avoidance by creditors or purchasers, may confer a good title on an innocent purchaser from him for value.⁶³ It has even been held that if the first buyer was innocent he could convey valid title to one who knew that the first seller's intent was fraudulent.⁶⁴ But if the second buyer knew of a mutual fraudulent intent in both the precedent parties, he could not get good title.⁶⁵

The subject of *voluntary conveyances* need not be considered, for such a conveyance, being without consideration, is not a *sale*.

Powers, 15 Mass. 244; 8 Am. Dec. 99; Hanford v. Artcher, 4 Hill, 271; Smith v. Craft, 123 U. S. 436. See note, 15 Am. St. Rep. pp. 912-917.

⁶⁰ Dodd v. Adams, 125 Mass. 398; McLane v. Johnson, 43 Vt. 48; Jones v. King, 86 Ill. 226; Warren v. Williams, 52 Me. 343; Stephens v. Gifford, 137 Pa. St. 219; 21 Am. St. Rep. 868.

⁶¹ Jackson v. Myers, 18 Johns. 425; Damon v. Bryant, 2 Pick. 411.

⁶² Wadsworth v. Havens, 3 Wend. 412; Kimball v. Hutchins, 3 Conn. 450.

⁶³ Zoeller v. Riley, 100 N. Y. 102; 53 Am. Rep. 157; Sleeper v. Chapman, 121 Mass. 404.

⁶⁴ Bergen v. Producers' Marble Yard, 72 Tex. 53.

⁶⁵ Smith v. Conkwright, 28 Minn. 23.

CHAPTER III.

ILLEGALITY.

A SALE of property with knowledge and intention that it is to be used for an immoral or illegal purpose is void. As for example, to the public enemy for war purposes ;¹ or for furnishing a house of prostitution ;² or a sale of intoxicating liquors,³ or a gambling implement.⁴

But to render the sale void, the knowledge must combine with an intention to promote the illegal purpose. The mere knowledge of the purpose is not sufficient.⁵ “ The participation of the vendor must be active to some extent ; he must do something, though indirectly, in furtherance of the vendee’s design to violate our law.” (Gaylor *v.* Sorragen, 32 Vt. 110 : 76 Am. Dec. 154). So it is no defense to an action for the price of a billiard table that it may be used in

¹ Hanauer *v.* Doane, 12 Wall. 342 ; Clements *v.* Yturria, 81 N. Y. 285.

² Hubbard *v.* Moore, 24 La. Ann. 591 ; 13 Am. Rep. 128 ; Michael *v.* Bacon, 40 Mo. 474 ; 8 Am. Rep. 138.

³ Green *v.* Collins, 3 Cliff. 494.

⁴ Rose *v.* Mitchell, 6 Colo. 102 ; 45 Am. Rep. 520.

⁵ Cases cited *supra*, 2, 4 ; Tracy *v.* Talmage, 14 N. Y. 162 ; 67 Am. Dec. 132, and note, 153.

gambling unless it was sold under a contract that it was to be so used,⁶ and so it is no defense to a note given for the price of a horse that it was bought for use in, and was actually used by the Confederates in the Confederate civil war,⁷ and so where beer is sold to the keeper of a house of prostitution with knowledge that it was to be resold in the brothel,^{7a} in the absence of proof that the seller intended it to be so used, and did something actively to promote its use. This distinction is thoroughly settled by judicial authority from Lord Mansfield down to the present day, but it seems a distinction without a difference. There could apparently be no stronger proof of intention that an article should be used for an immoral or illegal purpose than the sale of it with full knowledge that the buyer intended to use it for that purpose. Especially is this true where the article could hardly be used for any other purpose, as in the case of a sale of intoxicating liquors to be sold in violation of statute. We fully agree with Mr. Bennett (notes, *Benj. Sales*, 6th Am. ed., 505), that the distinction is "very subtle," "not very satisfactorily established, nor always observed."

⁶ *Brunswick v. Valleau*, 50 Iowa, 120; 32 Am. Rep. 119, and note, 122.

⁷ *Wallace v. Lark*, 12 S. C. 576; 32 Am. Rep. 516; *Tedder v. Odom*, 2 Heisk. 68; 5 Am. Rep. 25; *Hedges v. Wallace*, 2 Bush, 442; 92 Am. Dec. 497. To the same effect, *Sprague v. Rooney*, 82 Mo. 493; 52 Am. Rep. 383. *Contra*: *Tatum v. Kelley*, 25 Ark. 209; 94 Am. Dec. 717 (sale of guns with knowledge that they were to be used against the government).

^{7a} *Anheuser-Busch B. Ass'n v. Mason*, 44 Minn. 318; 20 Am. St. Rep. 580; 9 Lawy. Rep. Ann. 506.

Wager.—A sale amounting to a wager is void. As a sale of a horse for \$150 if H. G. is elected president, and \$500 if U. S. G. is elected.⁸ So of a sale at a fictitious price.^{8a}

“*Futures.*”—The same is true of a sale to be consummated by delivery and payment in the future, where both parties understand that no property is to pass, and that the only money to pass is the difference between the sale price and the market price on the agreed future day.⁹ But to render the sale void this intention must have been mutual; if either intended a *bona fide* sale, the contract is valid.¹⁰ A mere option to deliver or not, or as to the precise day, or a contract to buy or sell at a certain price at the other's option, is not necessarily unlawful, but depends on the intention of both.¹¹

⁸ *Harper v. Crain*, 36 Ohio St. 338; 38 Am. Rep. 589; *Bates v. Clifford*, 22 Minn. 52.

^{8a} *McNamara v. Gargett*, 68 Mich. 454; 13 Am. St. Rep. 355.

⁹ *Brua's Appeal*, 55 Pa. St. 294; *Lyon v. Culbertson*, 83 Ill. 33; 25 Am. Rep. 349; *Harvey v. Merrill*, 150 Mass. 1; 15 Am. St. Rep. 159; *Gregory v. Wendell*, 33 Mich. 337; 33 Am. Rep. 390; *Barnard v. Backhaus*, 52 Wis. 593; *Whitesides v. Hunt*, 97 Ind. 191; *Cockrell v. Thompson*, 85 Mo. 510; *Lyons Bk. v. Oskaloosa P. Co.*, 66 Iowa, 41; *McGrew v. City Produce Exchange*, 85 Tenn. 572; 4 Am. St. Rep. 771; *Beadles v. McElrath*, 85 Ky. 231; *Floyd v. Patterson*, 72 Tex. 202; 13 Am. St. Rep. 787.

¹⁰ *Murry v. Ocheltree*, 59 Iowa, 435; *Wall v. Schneider*, 59 Wis. 352; 48 Am. Rep. 520; *Soudheim v. Gilbert*, 117 Ind. 71; 10 Am. St. Rep. 23; *Whitesides v. Hunt*, 97 Ind. 191; 49 Am. Rep. 441; *Conner v. Robertson*, 37 La. Ann. 814; 55 Am. Rep. 521, and cases cited. See *Sawyer v. Taggart*, 14 Bush, 727; *Crawford v. Spencer*, 92 Mo. 498; 1 Am. St. Rep. 745.

¹¹ *Bigelow v. Benedict*, 70 N. Y. 202; 26 Am. Rep. 573; *White v. Barber*, 123 U. S. 392; *Crawford v. Spencer*, *supra*; *Story*

Sales to aid violation of statute.—If the article sold may be used innocently as well as in violation of statute, the sale is valid unless the seller sold for the purpose and with the intention of promoting the unlawful use. As in the case of a billiard-table, or of liquors sold at a place where the sale is lawful, to be resold where it is unlawful.¹² But the contract is void where the seller actively participates in effectuating the illegal design, as for example where he lawfully sells intoxicating liquors in one State, knowing that they are to be unlawfully resold in another State, and forwards them in concealed packages to a fictitious assignee, and furnishes false invoices to aid the buyer in committing perjury; or sells American sardines labelled as French.¹³ And it has been held that where a sale was made “with a view” to an unlawful resale, or “with intent” to that end, or “in a manner to aid” it, or so inseparably connected with it as necessarily to aid it, the sale is void.¹⁴ Slight

v. Salomon, 71 N. Y. 420; *Harris v. Tumbridge*, 83 N. Y. 92; 38 Am. Rep. 398.

¹² *Brunswick v. Valteau*, 50 Iowa, 120; 32 Am. Rep. 119; *Hill v. Spear*, 50 N. H. 253; 9 Am. Rep. 205, and cases cited; and see cases cited *supra*, 5, 6, 7; also *Gaylord v. Soragen*, 32 Vt. 110; 76 Am. Dec. 154.

¹³ *Kohn v. Melcher*, 43 Fed. Rep. 641; 10 Lawy. Rep. Ann. 439; *Skiff v. Johnson*, 57 N. H. 475; *Hull v. Ruggles*, 56 N. Y. 424; *Materne v. Horwitz*, 101 N. Y. 469.

¹⁴ *Webster v. Munger*, 8 Gray, 584; *Davis v. Bronson*, 6 Iowa, 410; *Foster v. Thurston*, 11 Cush. 322; *Tatum v. Kelley*, 25 Ark. 201; 94 Am. Dec. 717. So in *Graves v. Johnson*, 156 Mass. 211; 32 Am. St. Rep. 446, the case of a sale of intoxicating liquors in Massachusetts to be resold in Maine, it was held that as “the seller *expected and desired* the buyer to sell unlawfully in

active participancy will suffice to avoid the sale.¹⁵ Subsequent repeal of the statute does not make valid the sale,^{15a} nor render binding a subsequent promise to pay,^{15b}.

Maine, and intended to *facilitate* his doing so," and "was known by the buyer to have that intention," the sale was void. A valuable opinion by HOLMES, J., and a valuable note, 32 Am. St. Rep. 450. HOLMES, J., says: "The question is whether the sale is saved by the fact that the intent mentioned was not the controlling inducement to it. As the connection between the act in question, the sale here, and the illegal result, the sale in Maine—the tendency of the act to produce the result—is only through the later action of another man, the degree of connection or tendency may vary by delicate shades. If the buyer knows that the sale is made only for the purpose of facilitating his illegal conduct, the connection is at the strongest. If the sale is made with the desire to help him to his end, although primarily made for money, the seller cannot complain if the illegal consequence is attributed to him. If the buyer knows that the seller, while aware of his intent, is indifferent to it or disapproves of it, it may be doubtful if the connection is sufficient. *Compare*: Commonwealth v. Churchill, 136 Mass. 148, 150. It appears to us not unreasonable to draw the line as it was drawn in Webster v. Munger, 8 Gray, 584, and to say that when the illegal intent of the buyer is not only known to the seller, but encouraged by the sale as just explained, the sale is void. The accomplice is none the less an accomplice because he is paid for his act. See Commonwealth v. Harrington, 3 Pick. 26. This makes the validity or invalidity depend upon the presence or absence of a mere desire on the part of the sellers. This would amount to making every such sale invalid, because the seller naturally wishes that the buyer would sell and come again to buy more. This is excellent morals of the Puritanic pattern, but rather doubtful law.

¹⁵ Kottwitz v. Alexander, 34 Tex. 689; Gaylord v. Soragen, 32 Vt. 110; 76 Am. Dec. 154; Bancher v. Mansel, 47 Me. 58; Arnot v. Pittston Coal Co., 68 N. Y. 558; 23 Am. Rep. 190.

^{15a} Woods v. Armstrong, 54 Ala. 150; 25 Am. Rep. 671.

^{15b} Ludlow v. Hardy, 38 Mich. 690; Handy v. St. Paul G. Pub. Co., 41 Minn. 188; 16 Am. St. Rep. 695.

Sales in violation of the statute.—Some sales are pronounced by statute to be void; others are merely prohibited under penalty; and as to others a penalty is merely imposed on the seller. But as between the immediate parties such sales and all securities therefor are all equally void. As where a merchant sold a fertilizer without a tag stating its chemical composition, etc., as required by statute under penalty, held, that he could maintain no action on a note given for the purchase money.¹⁶ But the sale is not void where the prohibition and penalty extend only to “offering,” “carrying” or “exposing” for sale,¹⁷ for in such instances the penalty is incurred before the sale or without any sale.

Sunday Sales.—(1) Sales on Sunday are valid un-

¹⁶ *McConnell v. Kitchens*, 20 S. C. 430; 47 Am. Rep. 845. Also *Bancroft v. Dumas*, 21 Vt. 456; *Woods v. Armstrong*, 54 Ala. 150; 25 Am. Rep. 671; and note, 674; *Miller v. Post*, 1 Allen, 435; *Griffith v. Wells*, 3 Denio, 226; *Buxton v. Hamblen*, 32 Me. 448; *Mitchell v. Smith*, 1 Binney, 110; 2 Am. Dec. 417. But in *Niemeyer v. Wright*, 75 Va. 239; 40 Am. Rep. 720, it was held that where a statute required of sellers of commercial manures the observance of certain conditions, under penalty, but did not pronounce sales void for non-observance, the non-observant seller might still recover the prices. Citing *Larned v. Andrews*, 106 Mass. 435; 8 Am. Rep. 346, where the seller had not paid a government tax imposed as a condition precedent to carrying on the business; and to this effect are *Aiken v. Blaisdell*, 41 Vt. 655; *Corning v. Abbott*, 54 N. H. 469; *Rahter v. First Nat. Bank*, 92 Pa. St. 393; *Mandelbaum v. Gregovich*, 17 Nev. 87; 45 Am. Rep. 433; *Harris v. Runnels*, 12 How. 79.

¹⁷ *Williams v. Tappan*, 23 N. H. 385; *Brackett v. Hoyt*, 29 N. H. 264; *Jones v. Berry*, 33 N. H. 209; *Eberle v. Mehrbach*, 55 N. Y. 682.

less forbidden by statute.¹⁸ (2) Where the statute forbids them, but such a sale has been executed on both sides, neither party has any remedy whatever,¹⁹ because no cause of action arises out of an illegal transaction. But if the cause of action can be made out without reference to the Sunday transaction, the action is maintainable; as on an account stated on a week-day.²⁰ On this principle replevin may be maintained for a chattel sold and delivered on Sunday, by force of the seller's prior possession and ownership, against which the defendant's title will not avail because it was derived on Sunday.²¹ But generally it is held that the seller cannot recover on an oral promise or a note made on Sunday for goods sold on that day, or in assumpsit therefor.²² Whether the Sunday promise or sale may be ratified on a week-day is a point very much disputed.²³ But if the transac-

¹⁸ *Merritt v. Earle*, 29 N. Y. 120; 86 Am. Dec. 292; *Bloom v. Richards*, 2 Ohio St. 387; *Moore v. Murdock*, 26 Cal. 526; *Johnson v. Brown*, 13 Kans. 529; *Horacek v. Keebler*, 5 Neb. 358; *Kaufman v. Hamm*, 30 Mo. 387; *O'Rourke v. O'Rourke*, 43 Mich. 58; *Amis v. Kyle*, 2 Yerg. 31; 24 Am. Dec. 463.

¹⁹ *Myers v. Meinrath*, 101 Mass. 366; 3 Am. Rep. 368, and note, 371; *Block v. McMurry*, 56 Miss. 217; 31 Am. Rep. 357; *Chestnut v. Harbaugh*, 78 Pa. St. 473; *Greene v. Godfrey*, 44 Me. 25; *Ellis v. Hammond*, 57 Ga. 179. *Contra*: *Kinney v. McDermot*, 55 Iowa, 674; 39 Am. Rep. 191.

²⁰ *Melchoir v. McCarty*, 31 Wis. 252; 11 Am. Rep. 605.

²¹ *Magee v. Scott*, 9 Cush. 148; 55 Am. Dec. 49; *Tucker v. Mowrey*, 12 Mich. 378. But see *Kelley v. Cosgrove*, 83 Iowa, 229.

²² *Troewert v. Decker*, 51 Wis. 46; *Foreman v. Ahl*, 55 Pa. St. 325; *Finn v. Donahue*, 35 Conn. 216.

²³ That it is incapable of ratification. *Day v. McAllister*, 15 Gray, 433; *Pope v. Linn*, 50 Me. 83; *Shippey v. Eastwood*, 9 Ala. 198; *Vinz v. Beatty*, 61 Wis. 645; *Reeves v. Butcher*, 31

tion on the week-day amounts to a new sale and new promise, and is sued on as such without grounding on the Sunday transaction, it is valid,²⁴ the money paid on Sunday being a consideration for the week-day promise. If the goods are delivered and accepted on a week-day, this cures the invalidity of the Sunday negotiation,²⁵ at least so far as to enable a recovery for the value. If the sale on Sunday is void, no cause of action as for deceit or breach of warranty can be founded on it.²⁶

Sale partly invalid.—A sale of several articles at one time for an entire price is wholly void if any of the articles are forbidden.²⁷ Otherwise, if separate prices are agreed on.²⁸ So although a note given for such entire price would be void,²⁹ yet a recovery may

N. J. L. 224; *Gwinn v. Simes*, 61 Mo. 335; *Kountz v. Price*, 40 Miss. 341; *Catlett v. Trustees*, 62 Ind. 365; 30 Am. Rep. 197; *Thompson v. Williams*, 58 N. H. 248. *Contra*: *Adams v. Gay*, 19 Vt. 358; *Sayles v. Wellman*, 10 R. I. 465; *Smith v. Case*, 2 Oreg. 190; *Campbell v. Young*, 9 Bush, 240; *Tucker v. West*, 29 Ark. 386; *Russell v. Murdock*, 79 Iowa, 101; 18 Am. St. Rep. 348.

²⁴ *Winchell v. Cary*, 115 Mass. 560; 15 Am. Rep. 151; *Melchoir v. McCarty*, 31 Wis. 252; *Harrison v. Colton*, 31 Iowa, 16.

²⁵ *Bradley v. Rea*, 14 Allen, 20; 103 Mass. 188; 4 Am. Rep. 524.

²⁶ *Robeson v. French*, 12 Met. 24; 45 Am. Dec. 236; *Northrup v. Foot*, 14 Wend. 248; *Plaisted v. Palmer*, 63 Me. 576; *Gunderson v. Richardson*, 56 Iowa, 56; *Grant v. McGrath*, 56 Conn. 333.

²⁷ *Holt v. O'Brien*, 15 Gray, 311.

²⁸ *Coburn v. Odell*, 30 N. H. 557; *Foreman v. Ahl*, 55 Pa. St. 325.

²⁹ *Deering v. Chapman*, 22 Me. 488; *Widoe v. Webb*, 20 Ohio St. 431; 5 Am. Rep. 664. See, however, *Hynds v. Hays*, 25 Ind. 32.

still be held for the legal items of the account, where separate prices were stated, although a note had been given for the whole.³⁰

Conflict of Laws.—A completed sale valid where made will be held valid in another State, although not valid if there made.³¹ And ordinarily the sale is regarded as complete where the seller lives and delivers the goods to a common carrier, for transportation to the buyer, no matter how the order reaches him.³² If the order is delivered to the seller or his agent in the buyer's State, and the goods are sent by carrier from the seller's State, some authorities hold that the sale is in the latter State,³³ and others that it is in the former.³⁴ If the sale is not complete at the

³⁰ See 28.

³¹ *Orcutt v. Nelson*, 1 Gray, 536; *Torrey v. Corliss*, 33 Me. 333; *Read v. Taft*, 3 R. I. 175.

³² *Tuttle v. Holland*, 43 Vt. 542; *Frank v. Hoey*, 128 Mass. 263; *Tegler v. Shipman*, 33 Iowa, 194; 11 Am. Rep. 118; *Boothby v. Plaisted*, 51 N. H. 436; 12 Am. Rep. 140; *Nagrunder v. Gage*, 33 Md. 344; 3 Am. Rep. 177.

³³ *Dunn v. State*, 82 Ga. 29; *Herron v. State*, 51 Ark. 133; *Schlesinger v. Stratton*, 9 R. I. 578; See *State v. O'Neil*, 58 Vt. 140; 56 Am. Rep. 556.

³⁴ *Keiwert v. Meyer*, 62 Ind. 587; 30 Am. Rep. 206; *Rindskopf v. De Ruyter*, 39 Mich. 1; 33 Am. Rep. 340; *Hausman v. Nye*, 62 Ind. 485; 30 Am. Rep. 199. In *Webber v. Howe*, 36 Mich. 150; 24 Am. Rep. 590, a dealer in Ohio received in Michigan an order for liquors, which was afterwards shipped in Ohio and delivered to the vendee in Michigan. Held, a sale in Michigan, the court, COOLEY, C. J., observing: "Had the order been sent from this State to dealers in Ohio and filled there, or had an agent of the Ohio parties, who had no authority to agree upon sales, taken the order in this State and transmitted it to his principals, who accepted it and filled it, we think the instruction"—that it was an Ohio contract—"might

seller's residence, as for example, if the buyer may accept or reject on the arrival of the goods at his residence, courts differ as to whether the contract is to be construed by the law of the seller's State or of the buyer's.³⁵ If a contract made on Sunday is valid where made, it may be enforced in the State of the buyer's residence, although it would have been invalid if made there on Sunday.³⁶

have been sustained. *McIntyre v. Parks*, 3 Metc. 207 ; *Orcutt v. Nelson*, 1 Gray, 536 ; *Garland v. Lane*, 46 N. H. 245 ; *Kling v. Fries*, 33 Mich. 275. But the order was taken here by one of the plaintiffs in person, and the acceptance, as well as the giving of it, took place in this State. There are some cases which have decided that even in such circumstances the sale is not completed until the property is actually separated from the stock in the store and delivered to the carrier in pursuance of the order. *Sortwell v. Hughes*, 1 Curt. C. C. 244 ; *Abberger v. Marrin*, 102 Mass. 70 ; *Dolan v. Green*, 110 Id. 322. But these cases are not important here, since whether the contract of sale was executory or actually completed by delivery, it was equally invalid under our statute"—of frauds. In *Hausman v. Nye*, *supra*, an agent of a principal residing in Ohio contracted in Indiana with a person residing in Indiana, to sell him goods above \$50 in price. Nothing was said as to manner of shipment, there was no memorandum, earnest money nor payment, and the buyer received no part of the goods. Held, an Indiana contract. On the other hand, in *Schlesinger v. Stratton*, 9 R. I. 578, plaintiffs, liquor dealers, residing at New York, sold defendant, a liquor dealer, residing in Rhode Island, by a contract made in Rhode Island, liquors to be delivered to defendant on board a steamer in New York for transportation to Providence, defendant to have the privilege of returning them within thirty days if they did not prove as represented. It was held that the contract became complete on such delivery in New York, and that plaintiff could recover notwithstanding the statute of Rhode Island avoiding such sales unless made in the original packages.

³⁵ *Tegler v. Shipman*, 33 Iowa, 194 ; 11 Am. Rep. 118.

³⁶ *Brown v. Browning*, 15 R. I. 422 ; 2 Am. St. Rep. 908.

PART V.

PERFORMANCE OF THE CONTRACT.

CHAPTER I.

CONDITIONS.

It is a legal implication in every contract of sale that each of the parties shall be ready to perform at the time and place agreed on or determined by the rules of law¹ and that an effectual obstruction of performance by either releases the other.²

Refusal.—An absolute refusal by either, at the time for performance, to fulfill, releases the other, and the same is true of a positive refusal before such time and continued down to such time.³ If a party before such time puts it out of his power to perform,⁴ the other is released.⁵ It is generally held that even if this does

¹ *Dana v. King*, 2 Pick. 155 ; *Simmons v. Green*, 35 Ohio St. 104.

² *U. S. v. Peck*, 102 U. S. 64 ; *Durkee v. Gunn*, 41 Kans. 406 ; 13 Am. St. Rep. 300.

³ *Follansbee v. Adams*, 86 Ill. 13 ; *Textor v. Hutchings*, 62 Md. 150.

⁴ *Crist v. Armour*, 34 Barb. 378.

⁵ *U. S. v. Behan*, 110 U. S. 339 ; *Markham v. Markham*, 110 N. C. 356 ; *Butler v. Butler*, 77 N. Y. 472 ; 33 Am. Rep. 648.

not occur, a positive announcement before such time that he will not fulfill, releases the other party, and gives him an immediate right of action before the arrival of the time for performance.⁶ The only doubt

⁶ *Burtis v. Thompson*, 42 N. Y. 246 ; 1 Am. Rep. 516 ; *Holloway v. Griffith*, 32 Iowa, 409 ; 7 Am. Rep. 208 (contracts to marry) ; *Freer v. Denton*, 61 N. Y. 496 ; *Howard v. Daly*, 61 N. Y. 362 ; 19 Am. Rep. 285 ; *Fox v. Kitton*, 19 Ill. 519 ; *Dugan v. Anderson*, 36 Md. 567 ; 11 Am. Rep. 509 ; *Crabtree v. Messersmith*, 19 Iowa, 179 ; *James v. Adams*, 16 W. Va. 245. *Contra* : *Daniels v. Newton*, 114 Mass. 530 ; 19 Am. Rep. 384. The court in substance say that the party seeking damage must show a breach at a time when he was entitled to demand performance. This is begging the question under discussion—when is that time? Is it not accelerated by the promisor's absolute declaration that he will not perform on the arrival of the time fixed by the contract? On the other hand, in *Burtis v. Thompson*, *supra*, one judge said : " We do not think the defendant was entitled to defeat the plaintiff's action, and impose upon her the payment of a bill of costs, upon the ground that he had some thirty-six days, at the time the action was commenced, within which to repent, and retract his refusal." And another judge : " Any conduct by a party who has promised to marry another, that will render the contract no longer obligatory upon that other, is a violation of the duty and obligations created by that contract, and may therefore be treated by the injured party as constituting a breach. Clearly, notifying the other party of a settled determination not to perform the contract is such an act." In an elaborate discussion in *Dugan v. Anderson*, *supra*, where the plaintiff, having engaged to serve as clerk for a certain time, was discharged before that time, it was held he might sue immediately for the breach. The court observed, citing *Frost v. Knight*, L. R. 8 Exch. 111:

" The principle of this decision in cases to which it has been held applicable, is, that there is a breach of the contract when the promisor repudiates it and declares he will no longer be bound by it. It is said the promisee has an inchoate right to the performance of the bargain which becomes complete when the time for performance has arrived. In the mean time he has a right to have the contract kept open as a subsisting and effective contract. Its unimpaired and unimpeached efficacy

in such circumstances is whether the retracting party has not *locus penitentiæ* until the expiration of the agreed time, but it is usually considered that he is estopped to urge this by his emphatic and deliberate assertion that he will not repent. Such a declaration excuses a proffer of performance at the appointed time.⁷ But such a refusal must be distinct, absolute

may be essential to his interests. His rights acquired under it may be dealt with in various ways for his benefit and advantage. Of all such advantages the repudiation of the contract by the other party, and the announcement that it never will be fulfilled, must of course deprive him. It is therefore quite right to hold that such an announcement amounts to a violation of the contract *in omnibus*, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract and bring his action accordingly. The contract having been thus broken by the promisor, and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach, by reason of the future non-performance, becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual non-performance may therefore by anticipation be treated as a cause of action, and damages be assessed and recovered in respect of it, though the time for the performance may yet be remote. It is obvious that such a course must lead to the convenience of both parties, and though decisions ought not to be founded on grounds of convenience alone, they yet tend strongly to support the view that such an action ought to be admitted and upheld. By acting on such a notice of the intention of the promisor, the promisee may in many cases avert, or at all events materially lessen the injurious effects which would otherwise flow from the non-fulfillment of the contract; and in assessing the damages for breach of performance, a jury will of course take into account whatever the plaintiff has done or has had the means of doing, and as a prudent man ought in reason to have done, whereby his loss has been, or would have been, diminished."

⁷ *Bunge v. Koop*, 48 N. Y. 225; 8 Am. Rep. 546; *Parker v. Pettit*, 43 N. J. L. 517; *Lowe v. Harwood*, 139 Mass. 135.

and unequivocal to warrant action before the appointed time,⁸ and so a mere notice of an intention not to perform will not have this effect.⁹

Impossibility of performance, occasioned by the act of God or inevitable accident, will excuse performance, provided the party is himself without fault, as where the property is destroyed by such accident; and so if it is occasioned by the operation of the law, without his fault.¹⁰ But a distinction must be observed between utter impossibility and mere difficulty. If there was a contract to sell a certain horse, performance would be excused by its death, but if the contract was simply to sell a two-year-colt, its death would not excuse. So if the contract was to deliver a quantity of certain goods such as the seller manufactured, this would not be released by the burning of his mill, because he could get them elsewhere, but otherwise if it had been for goods made at his mill.¹¹ Therefore inconvenience or hardship is not equivalent to impossibility. The party can always protect himself in the contract. This question very frequently arises on contracts for personal service or for building or for carriage. In respect to sales, it is sufficient to say that mere disability does not excuse unless such was clearly the intent

⁸ *Dingley v. Oler*, 117 U. S. 490.

⁹ *Zuck v. McClure*, 98 Pa. St. 541.

¹⁰ *Dexter v. Norton*, 47 N. Y. 62; 7 Am. Rep. 415; *Wells v. Calnan*, 107 Mass. 514; 9 Am. Rep. 65; *Gould v. Murch*, 70 Me. 288; *Gill v. Benjamin*, 64 Wis. 362; 54 Am. Rep. 619.

¹¹ *Macon, etc., R. Co. v. Gibson*, 85 Ga. 1; 21 Am. St. Rep. 135, and cases cited, 141.

of the parties.¹² The law seems rather more lenient on this point in respect to contracts of sale of specific articles than in respect to the other contracts mentioned, for as is said in *Dexter v. Norton*, *supra*, "The minds of the parties are presumed to have contemplated the possible destruction of the property."

If the *act of a third person* is a condition precedent, it must be performed or excused. As where it is a condition that the article, in the opinion of a third person, shall effect a certain result, his opinion is final.¹³

Sales "to arrive."—On a sale of goods "to arrive," or "on arrival," no title passes until arrival, and no obligation is imposed on either party until that event occurs.¹⁴ The words "to arrive by" a certain time, or by a ship that sailed on or about a certain day, do not warrant the time of arrival nor of sailing.¹⁵ "To be shipped" in certain months or by certain routes is not answered by shipments in other months or by other routes.¹⁶ On a sale to arrive by ship, if the buyer on

¹² *Oakley v. Morton*, 11 N. Y. 25; 62 Am. Dec. 49; *Smoot's Case*, 15 Wall. 36; *Booth v. Spuyten D. R. M. Co.*, 60 N. Y. 487; *Eddy v. Clement*, 38 Vt. 486 (contract to furnish lumber, prevented by a general drouth, stopping all saw-mills); *Tobias v. Lissberger*, 105 N. Y. 404; 59 Am. Rep. 509 (sale of iron abroad, "for prompt shipment"—delay held not excused by ships being frozen up in harbor).

¹³ *Robbins v. Clark*, 129 Mass. 145; *Nofsinger v. Ring*, 71 Mo. 149; 36 Am. Rep. 456 (inspection of meat).

¹⁴ *Shields v. Pettie*, 4 N. Y. 122; *Neldon v. Smith*, 36 N. J. L. 154.

¹⁵ *Rogers v. Woodruff*, 23 Ohio St. 632; 13 Am. Rep. 276; *Hawes v. Lawrence*, 4 N. Y. 345.

¹⁶ *Hill v. Blake*, 97 N. Y. 216.

notification refuses to accept, no manual tender is necessary.^{16a}

Successive Deliveries.—On a sale of goods to be delivered in instalments, the failure to deliver any one instalment, answering to the contract as to time or quality, releases the buyer from obligation to receive any more,¹⁷ and in like manner the failure of the buyer to accept an instalment releases the seller.¹⁸ But the buyer may forfeit his right of rescission by unreasonable delay in asserting it or by accepting and using goods that do not answer the contract.¹⁹

Successive payments.—The failure or refusal of the buyer to pay any agreed instalment, if he has become insolvent or repudiates the contract, releases the seller from obligation to make further delivery.²⁰ But not so if the refusal is less radical, as for example, on the ground that the delivery is short in quantity, or the

^{16a} Pollen v. LeRoy, 30 N. Y. 549.

¹⁷ Norrington v. Wright, 115 U. S. 188; King Philip Mills v. Slater, 12 R. I. 82; 34 Am. Rep. 603; Bollman v. Burt, 61 Md. 415; Catlin v. Tobias, 26 N. Y. 217; 84 Am. Dec. 183; Lehigh Zinc Co. v. Trotter, 42 N. J. Eq. 678. *Contra*: Lucesco Oil Co. v. Brewer, 66 Pa. St. 351.

¹⁸ Higgins v. Del., etc., R. Co., 60 N. Y. 553; Haines v. Tucker, 50 N. H. 307.

¹⁹ Blackburn v. Reilly, 47 N. J. L. 290; 54 Am. Rep. 159; Scott v. Kittanning Coal Co., 89 Pa. St. 231; 33 Am. Rep. 753; Miller v. Moore, 83 Ga. 685; 20 Am. St. Rep. 329.

²⁰ Stephenson v. Cady, 117 Mass. 6; Curtis v. Gibney, 59 Md. 131; Bradley v. King, 44 Ill. 339; Rugg v. Moore, 110 Pa. St. 236; Dwinel v. Howard, 30 Me. 258; Robson v. Bohn, 27 Minn. 333; Florence Min. Co. v. Brown, 124 U. S. 385; Fletcher v. Cole, 23 Vt. 114; Haines v. Tucker, 50 N. H. 309.

time for part payment has not arrived, or no payment is due till entire delivery is made, or not till inspection.²¹

Sales on trial.—In case of a sale on trial, the title and risk remain in the seller until the lapse of the time fixed or of a reasonable time for election.²² But after that, the sale becomes absolute.²³

Sale or return.—On a sale with right to return, the title and risk pass to the buyer at once, subject to return within a time specified or a reasonable time.²⁴ But after that the right to return is forfeited.²⁵

Sales to be "satisfactory."—A condition that an article shall be satisfactory to the purchaser is really a species of warranty. It occurs much more frequently in respect to articles to be manufactured

²¹ *Mid. Ry. Co. v. Ontario R. Mills*, 10 Ont. App. 667; *Winchester v. Newton*, 2 Allen, 492; *Shinn v. Bodine*, 60 Pa. St. 182; 100 Am. Dec. 560; *Erwin v. Harris*, 87 Ga. 333; and see *Gill v. Benjamin*, 64 Wis. 362; 54 Am. Rep. 619; *Palmer v. Breen*, 34 Minn. 39. See *Blackburn v. Reilly*, 47 N. J. L. 290; 54 Am. Rep. 159.

²² *Hunt v. Wyman*, 100 Mass. 186; *Mowbray v. Cady*, 40 Iowa, 604.

²³ *Waters Heater Co. v. Mansfield*, 48 Vt. 378; *Kahn v. Klabunde*, 50 Wis. 235; *Dewey v. Erie*, 14 Pa. St. 211; 53 Am. Dec. 533; *Spickler v. Marsh*, 36 Md. 222; *Prairie Farm Co. v. Taylor*, 69 Ill. 440; 18 Am. Rep. 621; *Aultman v. Theirer*, 34 Iowa, 272.

²⁴ *Crocker v. Gullifer*, 44 Me. 491; *McKinney v. Bradlee*, 117 Mass. 321; *Hotchkiss v. Higgins*, 52 Conn. 205; 52 Am. Rep. 582; *Schlesinger v. Stratton*, 9 R. I. 578; *House v. Beak*, 141 Ill. 290; 33 Am. St. Rep. 307.

²⁵ *Ray v. Thompson*, 12 Cush. 281; 59 Am. Dec. 187; *Jones v. Wright*, 71 Ill. 61; *Childs v. O'Donnell*, 84 Mich. 533.

than to those already existing, and the general doctrine is that the buyer need not accept unless he is satisfied.²⁶ A few cases hold that he is bound to give the article a fair trial, and a number hold that he must be dissatisfied in good faith to avoid the contract.²⁷ The same is true of a contract to the satisfaction of a third person.²⁸ It would seem that if

²⁶ *Brown v. Foster*, 113 Mass. 136 ; 18 Am. Rep. 463 (suit of clothes) ; *Gibson v. Cranage*, 39 Mich. 49 ; 33 Am. Rep. 351 (portrait), and note, 353 ; *Wood, etc., Co. v. Smith*, 50 Mich. 565 ; 45 Am. Rep. 57 (harvesting machine) ; *Zaleski v. Clark*, 44 Conn. 218 ; 26 Am. Rep. 446 (bust) ; *Singerly v. Thayer*, 108 Pa. St. 291 (elevator) ; *Exhaust Ventilator Co. v. Chicago, etc., R. Co.*, 66 Wis. 218 ; 57 Am. Rep. 257 (exhaust-fans) ; and cases cited by Mr. Bennett. (Notes, Benj. Sales, 6th Am. ed. p. 569.)

²⁷ *McClure v. Briggs*, 58 Vt. 82 ; 56 Am. Rep. 557 (organ) ; *Daggett v. Johnson*, 49 Vt. 345 (milk-pans). In *Duplex Safety Boiler Co. v. Garden*, 101 N. Y. 387 ; 54 Am. Rep. 709, there was a contract to alter boilers, to be paid for as soon as defendant was satisfied that they were "a success." He received and used them without complaint. Held, that he could not set up an unfounded allegation of dissatisfaction in an action for the price. The court distinguished cases "where the object of the contract was to gratify taste, serve personal convenience, or satisfy individual preference." So in *Hawkins v. Graham*, 149 Mass. 284 ; 14 Am. St. Rep. 422, where there was a contract to furnish a steam-heating apparatus to "satisfactory completion," it was held that this meant satisfaction to "the mind of a reasonable man," and not to the defendant's "private taste or liking." So in *Doll v. Noble*, 116 N. Y. 230 ; 15 Am. St. Rep. 398, a contract to do work on houses "to the entire satisfaction" of the owner and "in the best workmanlike manner," was held performed by work in the best workmanlike manner, and it was ruled that the owner could not evade payment by arbitrarily and unreasonably saying he was not satisfied. See note, 54 Am. Rep. 711, and *Veazie v. Bangor*, 53 Me. 50.

²⁸ *Balt., etc., R. Co. v. Brydon*, 65 Md. 198 ; 57 Am. Rep. 318.

these phrases in question do not mean the arbitrary and uncontrolled satisfaction of the party, as indicated by his announcement, they have no useful meaning, for in the absence of such phrases the law will always imply that the party must be deemed satisfied with that which ought to satisfy him. Keeping and using the article may estop the buyer from setting up dissatisfaction.^{28a}

Time.—The buyer may justify refusal to accept goods not delivered within the agreed time.²⁹ And where he is to remove the article within a stipulated time, and fails to do so, his right is forfeited.³⁰

^{28a} *Campbell Press Co. v. Thorp*, 36 Fed. Rep. 414.

²⁹ *Rouse v. Lewis*, 2 Keyes, 352.

³⁰ *Woodward v. Boston*, 115 Mass. 81 ; *Holton v. Goodrich*, 35 Vt. 19 ; *Roisaubin v. Reed*, 1 Abb. Ct. App. Dec. (N. Y.) 161. But *Davis v. Emery*, 61 Me. 140 ; 14 Am. Rep. 553, *contra*, holding the buyer merely liable in damages for the delay.

CHAPTER II.

WARRANTY.

ORDINARILY a buyer takes the subject of the sale at his own risk as to its quality. *Caveat emptor* is the general rule of trade. But if the seller gives "assurance of some fact, coupled with an agreement, express or implied, to make the assurance good or pay for the deficiency," this is called a warranty.¹ This excuses the buyer from the duty of inspection for himself, which otherwise subsists; he may rely on the warranty. It can only be made at the time of and as an inducement to the sale,² or during the negotiations resulting in the sale,³ or before the sale is completed,^{3a} and is invalid, if made afterward, without new consideration,⁴ but it may be valid if promised on the sale and not made till after the sale.⁵ A

¹ Bennett's Notes (Benj. Sales, 6th Am. ed., p. 622); *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260; 16 Am. St. Rep. 753.

² *Bryant v. Crosby*, 40 Me. 9; *Zimmerman v. Morrow*, 28 Minn. 367.

³ *Way v. Martin*, 140 Pa. St. 499; *Hobart v. Young*, 63 Vt. 363.

^{3a} *Vincent v. Leland*, 100 Mass. 432.

⁴ *Morehouse v. Comstock*, 42 Wis. 626; *Summers v. Vaughan*, 35 Ind. 323; 9 Am. Rep. 741; *Cady v. Walker*, 62 Mich. 157; 4 Am. St. Rep. 834.

⁵ *Collette v. Weed*, 68 Wis. 428.

new consideration renders a warranty made after sale binding.⁶ Representations privately made in regard to property which has been advertised for sale at public auction may sustain an action for breach of warranty in favor of one who bids in the property in reliance on them.^{6a}

Express warranty.—The word “warrant” need not be used; mere averments of opinion or praise do not constitute a warranty; a positive statement of a material fact intended and relied on as a warranty is sufficient.^{6b} Some courts hold the intent essential,⁷ others hold it immaterial.⁸ If the words are ambiguous, the question is for the jury,⁹ but if unambiguous, for the court.¹⁰ Mr. Bennett thinks the true

⁶ *Congar v. Chamberlain*, 14 Wis. 258, where the buyer had refused the goods because not delivered at the agreed time, and the seller agreed, if he would accept, that he would warrant against freezing.

^{6a} *Crossman v. Johnson*, 63 Vt. 333; 13 Lawy. Rep. Ann. 678.

^{6b} *Kircher v. Conrad*, 9 Mont. 191; 18 Am. St. Rep. 731; *Drew v. Edmunds*, 60 Vt. 401; 6 Am. St. Rep. 122.

⁷ *McFarland v. Newman*, 9 Watts, 55; 34 Am. Dec. 497; *Foster v. Caldwell*, 18 Vt. 176; *Ender v. Scott*, 11 Ill. 35; *Enger v. Dawley*, 62 Vt. 165.

⁸ *Reed v. Hastings*, 61 Ill. 266; *Hawkins v. Pemberton*, 51 N. Y. 198; 10 Am. Rep. 595; *Bower v. Fenn*, 90 Pa. St. 359; 35 Am. Rep. 662.

⁹ *Tuttle v. Brown*, 4 Gray, 457; 64 Am. Dec. 80 (a cow “is all right”); *Baum v. Stevens*, 2 Ired. L. 411 (“a young, likely, healthy negro”); *Herron v. Dibrell*, 87 Va. 289 (tobacco, “sound, sun-dried, and would certainly keep”); *Roberts v. Morgan*, 2 Cowen, 438 (“sound horse except bunch on his leg,” but he had glanders); *Cook v. Moseley*, 13 Wend. 277 (not afraid to warrant horse sound so far as he knew). See *Robson v. Miller*, 12 S. C. 586; 32 Am. Rep. 518.

¹⁰ *Daniells v. Aldrich*, 42 Mich. 58; *Stroud v. Pierce*, 6

rule to be that the jury may judge whether the words were of mere opinion or commendation, or of positive affirmation of quality and intended to be so understood and relied on by the buyer, and if the latter, they constitute a warranty in law and the seller's intent not to warrant is immaterial.¹¹ Some delicate distinctions arise in the construction of warranties, as to what words amount to a warranty, and some leading instances are cited in a note.^{11a}

As a *rule of evidence*, a written warranty may not be changed or added to by parol, and so of a formal written contract or formal bill of sale silent on the subject of warranty, but not so of a mere receipt for

Allen, 413 (piano "well-made and would stand up to concert pitch").

¹¹ Bennett's notes (Benj. Sales, 6th Am. ed., p. 625), citing *Com. v. Jackson*, 132 Mass. 16; *Beals v. Olmstead*, 24 Vt. 114; 58 Am. Dec. 150; *McClintock v. Emick*, 87 Ky. 167; *Ormsby v. Budd*, 72 Iowa, 80; *Drew v. Ellison*, 60 Vt. 401.

^{11a} Not a warranty: "Considered kind"—horse, *Wason v. Rowe*, 16 Vt. 525; (horse "kind, sound and gentle"), *Holmes v. Tyson*, 147 Pa. St. 305; 15 Lawy. Rep. Ann. 209; ("wine in merchantable order to be approved by buyer in three days"), *Gentili v. Starace*, 133 N. Y. 140; (growing crop of tobacco, to be well cured and in good condition), *Reed v. Randall*, 29 N. Y. 358; 86 Am. Dec. 305; (horse "all right every way for livery purposes," but with foal), *Whitney v. Taylor*, 54 Barb. 536. *Contra*: piano "warranted for five years," warranty of strength, *Snow v. Schomacker Manuf. Co.*, 69 Ala. 111; 44 Am. Rep. 509; (horse "sound and kind"), *Hobart v. Young*, 63 Vt. 366; 12 Lawy. Rep. Ann. 693; (horse "all right but will shy," warranty against partial blindness), *Kingsley v. Johnson*, 49 Conn. 462; (horse "sound and right," but a "cribber"), *Walker v. Hoisington*, 43 Vt. 608; (corns on a horse's foot, question for jury), *Alexander v. Dutton*, 58 N. H. 282. See notes, 3 Lawy. Rep. Ann. 184; 12 Id. 639.

the price or an informal bill of parcels or an informal or incomplete contract.¹² And on principle it would seem that a written general warranty covers even obvious defects.^{12a} (See *infra*).

Obvious defects.—As a rule a general oral warranty does not apply to patent and obvious defects apparent on ordinary inspection by an ordinary buyer. As for example, an obvious deformity in a horse or a slave.¹³ But in some modern cases it is considered that if the buyer does not rely wholly on his observation but relies to some extent on such an *express* warranty, he is not without remedy.¹⁴ Although a defect may be obvious, yet the extent of it may not be, and the buyer is not remediless in case of its proving more serious than is casually apparent.¹⁵ The defect must be obvious to an unskilled buyer,¹⁶

¹² See cases cited by Mr. Bennett (notes Benj. Sales, 6th ed., p. 625, 626), and a discussion of the subject in Browne's Parol Evidence, 125-178, and especially compare Chapin v. Dobson, 78 N. Y. 74; 34 Am. Rep. 512; Mast v. Pearce, 58 Iowa, 579; 43 Am. Rep. 125.

^{12a} Callaway v. Jones, 19 Ga. 277.

¹³ Hill v. North, 34 Vt. 604; Bennett v. Bnchan, 76 N. Y. 386; Long v. Hicks, 2 Humph. 305; Marshall v. Drawhorn, 27 Ga. 275; Leavitt v. Fletcher, 60 N. H. 182.

¹⁴ Pinney v. Andrus, 41 Vt. 631; First Nat. Bk. v. Grindstaff, 45 Ind. 158; Fletcher v. Young, 69 Ga. 591; Storrs v. Emerson, 72 Iowa, 390; Watson v. Roode, 30 Neb. 264.

¹⁵ Fisher v. Pollard, 2 Head, 314; 75 Am. Dec. 740; Shewalter v. Ford, 34 Miss. 417; Wallace v. Frazier, 2 N. & McC. 516.

¹⁶ Drew v. Ellison, 60 Vt. 401; Vates v. Cornelius, 59 Wis. 615; Thompson v. Harvey, 86 Ala. 522; Meckley v. Parsons, 66 Iowa, 63; 55 Am. Rep. 261; Thompson v. Botts, 8 Mo. 710; Tabor v. Peters, 74 Ala. 90; 49 Am. Rep. 804, a very striking case.

and on a simple inspection the buyer is not bound to take unusual pains to investigate.¹⁷ If the seller resorts to artifice to conceal or prevent inspection, or misrepresents obvious defects, a general warranty may cover them.¹⁸ The warranty may be held to cover even obvious defects if that intention is evident.^{18a}

Permanence of defect.—The defect need not be permanent. It is enough if temporary but affecting the present value.¹⁹

Future condition.—Ordinarily a warranty speaks only of the present condition of the subject of sale,²⁰ but the language may be broad enough to extend to the future.²¹

Warranty by agents.—Auctioneers and factors have no implied authority to warrant;²² and so generally of special agents “to sell,” in the absence of custom to

¹⁷ As to go to the top of a kiln to inspect brick, *Meickley v. Parsons*, *supra*.

¹⁸ *Chadsey v. Greene*, 24 Conn. 562; *Kenner v. Harding*, 85 Ill. 264; 28 Am. Rep. 615.

^{18a} *Fitzgerald v. Evans*, 49 Minn. 541.

¹⁹ *Roberts v. Jenkins*, 21 N. H. 116; 53 Am. Dec. 169; *Korne-gay v. White*, 10 Ala. 255; *Thompson v. Bertrand*, 23 Ark. 731; *Woodbury v. Robbins*, 10 Cush. 520.

²⁰ *Lord v. Edwards*, 148 Mass. 476; 12 Am. St. Rep. 581; *Luthy v. Waterbury*, 140 Ill. 664; *Miller v. McDonald*, 13 Wis. 673; *Leggat v. Sands Ale Co.*, 60 Ill. 158; *Bowman v. Clemmer*, 50 Ind. 10; *Merrick v. Bradley*, 19 Md. 50 (slave warranted sound committed suicide just before delivery).

²¹ *Osborn v. Nicholson*, 13 Wall. 654 (“he should be a slave for life,” but was emancipated by the proclamation).

²² *The Monte Allegre*, 9 Wheat. 647; *Dodd v. Farlow*, 11 Allen, 426; 87 Am. Dec. 726.

the contrary.²³ But it is said that a general agent for selling goods may warrant unless expressly forbidden.²⁴ General custom may support an agent's warranty,²⁵ and so where the articles are usually warranted by the owner when sold by him personally.²⁶

Implied warranties.—Certain warranties are implied by the law, without express assertion, on the sale of goods. The following are the principal implied warranties :

1. *Title.*—Warranty of ownership in the seller is invariably implied when he is in possession and is acting in his individual right,²⁷ and this implies a clear title,²⁸ and actual or constructive possession, as by agent, bailee, etc.²⁹ But warranty of ownership is

²³ *Cooley v. Perrine*, 41 N. J. L. 322 ; 42 Id. 623 ; 32 Am. Rep. 210 ; *Smith v. Tracy*, 36 N. Y. 79 ; *Herring v. Skaggs*, 73 Ala. 446.

²⁴ *Deming v. Chase*, 48 Vt. 382 ; *Murray v. Brooks*, 41 Iowa, 45 ; *Boothby v. Scales*, 27 Wis. 635 ; *Talmage v. Bierhause*, 103 Ind. 270 ; *Flatt v. Osborne*, 33 Minn. 98. But see *Wait v. Borne*, 123 N. Y. 604 ; *Upton v. Suffolk Co. Mills*, 11 Cush. 586 ; 59 Am. Dec. 163 ; *Palmer v. Hatch*, 46 Mo. 585, *contra*.

²⁵ *Pickert v. Marston*, 68 Wis. 465 ; 60 Am. Rep. 877.

²⁶ *Mayer v. Dean*, 115 N. Y. 556 ; *Herring v. Skaggs*, *supra* ; *Kircher v. Conrad*, 9 Mont. 191 ; 18 Am. St. Rep. 731.

²⁷ *Gilchrist v. Hilliard*, 53 Vt. 592 ; 38 Am. Rep. 706, a sale of accounts ; *Burt v. Dewey*, 40 N. Y. 283 ; 100 Am. Dec. 482, and note, 484 ; *Fawcett v. Osborn*, 32 Ill. 411 ; 83 Am. Dec. 278 ; *Lile v. Hopkins*, 12 Sm. & M. 299 ; 51 Am. Dec. 115 ; *Perley v. Balch*, 23 Pick. 283 ; 34 Am. Dec. 56 ; and many cases cited by Mr. Bennett (notes, Benj. Sales, 6th Am. ed. 631, 632).

²⁸ *Brown v. Cockburn*, 37 U. C., Q. B., 592 ; *Close v. Crossland*, 47 Minn. 500.

²⁹ *Shattuck v. Green*, 104 Mass. 45.

not implied where the seller is not in possession, actual or constructive, and especially where the subject of sale is in the hostile possession of another.³⁰ It is unanimously held however that there is no such warranty on official sales.³¹

2. *Identity of kind*.—A warranty is implied that the article is what it is called or described, and what is contracted for.³² The cases adjudging this doctrine,

³⁰ *Penchen v. Imp. Bank*, 20 Ont. 325; *Bank of Northampton v. Mass. Loan Co.*, 123 Mass. 330; *Gould v. Bourgeois*, 51 N. J. L. 373; *Krumbhaar v. Birch*, 83 Pa. St. 426; *Scranton v. Clark*, 39 N. Y. 220; 100 Am. Dec. 430; *Scott v. Hix*, 2 Sneed, 192; 62 Am. Dec. 458, and note, 460; *Huntington v. Hall*, 36 Me. 501; 58 Am. Dec. 765. Mr. Bennett thinks that "it may still be open to question whether the distinction between a vendor in and one out of possession ought to be, or will be generally sustained" (notes, *Benj. Sales*, 6th Am. ed. 635), an opinion in which it is not difficult to coincide, but he cites no cases to warrant it.

³¹ *The Monte Allegre*, 9 Wheat. 616; *Neal v. Gillaspay*, 56 Ind. 451; 26 Am. Rep. 37; *Baker v. Arnot*, 67 N. Y. 448, and note, 38.

³² *Osgood v. Lewis*, 2 Harr. & G. 495; 18 Am. Dec. 317 ("winter-pressed sperm oil"); *Borrekins v. Bevan*, 3 Rawle, 23; 23 Am. Dec. 85 ("blue paint"); *Henshaw v. Robins*, 9 Met. 87; 43 Am. Dec. 367 ("indigo"); *Edgar v. Can. Oil Co.*, 23 Up. Can., Q. B. 333 ("rock-oil"); *Mader v. Jones*, 1 Russ. & Chessley (N. Sc.) 82 ("Gulf Herring, Split, No. 1"); *Hawkins v. Pemberton*, 51 N. Y. 198; 10 Am. Rep. 595 ("blue vitriol"); *Wolcott v. Mount*, 36 N. J. L. 262; 13 Am. Rep. 438 ("early strap-leaf, red-top turnip seed"); *White v. Miller*, 71 N. Y. 118; 27 Am. Rep. 13 ("large Bristol cabbage-seed"; overruling *Swett v. Colgate*, 20 Johns. 196; 11 Am. Dec. 266; *Seixas v. Woods*, 2 Caines, 48; 2 Am. Dec. 215); *Van Wyck v. Allen*, 69 N. Y. 61; 25 Am. Rep. 136 ("early, flat, Dutch Van Wycklin cabbage-seed"); *Dounce v. Dow*, 64 N. Y. 411 ("XX pipe-iron"); *Jones v. George*, 61 Tex. 345; 48 Am. Rep. 280 ("Paris Green"); *Forcheimer v. Stewart*, 65 Iowa, 594; 54 Am. Rep. 30 ("choice,

it is believed, are uniformly those in which the failure of the article to answer the buyer's demand is not evident on inspection and he is forced to rely on the seller's representation. It is to be observed also that this species of warranty is of general *kind*, and not of *quality*, a distinction which proves sometimes to be somewhat refined. Under this head comes commercial paper, on the sale of which there is implied a warranty that the signatures are genuine,³³ and so of negotiable bonds, and that the signers are legally competent to contract;³⁴ but not that they are responsible,³⁵ nor that the note is not usurious.³⁶ So there is an implied warranty that a non-negotiable certificate of scrip corporation dividends was legally issued,³⁷ and that accounts sold are genuine and owing.³⁸ But it is occasionally considered that this warranty does not arise where the article is on in-

sugar-cured, canvassed hams"); *Lewis v. Rountree*, 79 N. C. 122; 28 Am. Rep. 309 ("strained rosin"); *Morse v. Moore*, 83 Me. 473 ("good, clear, merchantable ice"); *Holloway v. Jacoby*, 120 Pa. St. 583; 6 Am. St. Rep. 737 ("good saleable corn"); *O'Donohue v. Leggett*, 134 N. Y. 40. *Contra*: *Kingsbury v. Taylor*, 29 Me. 508; 50 Am. Dec. 607 ("summer-rye seed"); *Shisler v. Baxter*, 109 Pa. St. 443; 58 Am. Rep. 738 ("Wakefield cabbage-seed").

³³ *Meriden Nat. Bk. v. Gallaudet*, 120 N. Y. 303; *Terry v. Bissell*, 26 Conn. 23; *Worthington v. Cowles*, 112 Mass. 30; *Smith v. McNair*, 19 Kans. 330; 27 Am. Rep. 117.

³⁴ *Lobdell v. Baker*, 1 Met. 193; 35 Am. Dec. 358.

³⁵ *Day v. Kinney*, 131 Mass. 37; *Burgess v. Chapin*, 5 R. I. 225.

³⁶ *Littauer v. Goldman*, 72 N. Y. 506; 28 Am. Rep. 171. *Contra*: *Overton v. Bolton*, 9 Heisk. 762; 24 Am. Rep. 367.

³⁷ *Wood v. Sheldon*, 42 N. J. L. 421; 36 Am. Rep. 523.

³⁸ *Gilchrist v. Hilliard*, 53 Vt. 592; 38 Am. Rep. 706.

spection and the buyer's knowledge is equal to that of the seller.³⁹

3. *Quality*.—It is a general rule, that on the sale of a chattel inspected or subject to inspection by the purchaser there is no implied warranty of quality, and that “a sound price does not import a sound quality.”⁴⁰ Even the use of words descriptive of general *kind* does not necessarily imply a warranty of *quality*,⁴¹ and this has been carried so far as to include descriptive and laudatory adjectives.⁴² In a few jurisdictions it is held that a sound price implies a war-

³⁹ Lord *v. Grow*, 39 Pa. St. 88; 80 Am. Dec. 504.

⁴⁰ Getty *v. Rountree*, 2 Pinney, 379; 2 Chand. 28; 54 Am. Dec. 138, and cases cited; and see cases under 32, *supra*; and a careful list of cases cited by Mr. Bennett (notes, Benj. Sales, 6th Am. ed., pp. 639-641).

⁴¹ Winsor *v. Lombard*, 18 Pick. 57 (“No. 1 mackerel” and “No. 2 mackerel”); Gossler *v. Eagle S. Refinery*, 103 Mass. 331 (“Manilla Sugar”); Hyatt *v. Boyle*, 5 G. & J. 110; 25 Am. Dec. 276 (“Parkin tobacco”); Coate *v. Terry*, 26 Up. Can. C. P. 571 (“Port wine” or “sherry”); Snelgrove *v. Bruce*, 16 Up. Can. C. P. 561 (seeds—no warranty of freshness or fitness); Jennings *v. Gratz*, 3 Rawle, 168; 23 Am. Dec. 111 (“Young Hyson tea”); Sweat *v. Shumway*, 102 Mass. 365; 3 Am. Rep. 471 (“horn chains”).

⁴² Hogins *v. Plympton*, 11 Pick. 97 (“good fine wire”); Barrett *v. Hall*, 1 Aikens, 269 (“good cooking stoves”); Towell *v. Gatewood*, 2 Scam. 22; 33 Am. Dec. 437 (“first and second rate tobacco”); Carondelet Iron Works *v. Moore* (“mill iron”); Fraley *v. Bispham*, 10 Pa. St. 320; 51 Am. Dec. 486 (“superior, sweet-scented, Kentucky leaf tobacco”); Rice *v. Codman*, 1 Allen, 377 (“invoice weight 2½ lbs. average per yard”); Wiggin *v. Butcher*, 154 Mass. 447 (“occasional ham sour”). But *contra*: Miller *v. Moore*, 83 Ga. 684; 20 Am. St. Rep. 329 (“No. 2 white mixed corn, bulk”); Hastings *v. Lovering*, 2 Pick. 214; 13 Am. Dec. 420 (“prime quality winter oil”); Chisholm *v. Proudfoot*, 15 U. Can. Q. B. 203 (“Trafalgar Mills, extra-superfine flour”); Forcheimer *v. Stewart*, 65 Iowa, 594; 54 Am. Rep. 30 (“choice,

ranty of soundness,⁴³ and this seems to the writer a just rule. It is ordinarily true that there is no implied warranty of a particular quality where there is an express warranty of some other quality, on the ground that the expression of one excludes the other.⁴⁴

In case of sale by *sample*, and in absence of inspection, there is an implied warranty that the goods shall be equal in quality to the sample,⁴⁵ but none

sugar-cured, canvassed hams," but not under inspection); *Ryan v. Ulmer*, 108 Pa. St. 332; 56 Am. Rep. 210 ("fully-cured, sweet-pickled shoulders"); *Morse v. Moore*, 83 Me. 473; 23 Am. St. Rep. 783 ("good, clear, merchantable ice"). In short, the law seems to regard such adjectives as simply and literally *nominal*: as the boy said in excuse for crying and selling cold mince pies as "hot"—"that's the name of 'em."

⁴³ *Bulwinkle v. Cramer*, 27 S. C. 376; 13 Am. St. Rep. 645; *Blackwood v. Cutting Packing Company*, 76 Cal. 212; 9 Am. St. Rep. 199 (by code); *Bailey v. Nickols*, 2 Root, 407; 1 Am. Dec. 83; probably overruled in *Dean v. Mason*, 4 Conn. 428; 10 Am. Dec. 162.

⁴⁴ *Baldwin v. Van Deusen*, 37 N. Y. 487; *DeWitt v. Berry*, 134 U. S. 313; *Deming v. Foster*, 42 N. H. 175; *McGraw v. Fletcher*, 35 Mich. 104.

⁴⁵ *Leonard v. Fowler*, 44 N. Y. 289; *Brigg v. Hilton*, 99 N. Y. 517; *Foot v. Bentley*, 44 N. Y. 166; 4 Am. Rep. 652; *Brigham v. Retelsdorf*, 73 Iowa, 712; *Murphy v. McGraw*, 74 Mich. 318; *Brantley v. Thomas*, 22 Tex. 270; 73 Am. Dec. 264; *Dickinson v. Gay*, 7 Allen, 29; 83 Am. Dec. 656; *Gould v. Stein*, 149 Mass. 570; 14 Am. St. Rep. 455; notes, 7 Am. Dec. 126; 55 Id. 321. See *DeWitt v. Berry*, 134 U. S. 306. In Pennsylvania it is held that on sale by sample there is no implied warranty except of *kind* and *merchantability*. *Boyd v. Wilson*, 83 Pa. St. 319; 24 Am. Rep. 176; *West. Rep. Co. v. Jones*, 108 Pa. St. 55. In *Moses v. Mead*, 1 Denio, 378; 43 Am. Dec. 676, BRONSON, C. J., said: "We have made one inroad upon the common-law rule, and allowed a warranty to be implied upon a sale by sample, that the bulk of the article corresponds in quality with the sample exhibited. *Waring v. Mason*, 18 Wend.

against latent defects.⁴⁶ Generally the sample is exhibited, and to raise the implied warranty it must appear that both parties understood that the bulk was to be like it in quality.^{46a} Merely showing part of the goods instead of the whole does not necessarily constitute a sale by sample.^{46b}

The sample need not be present at the sale. Any known or ascertainable standard of judgment referred to, as for example goods previously furnished, renders the sale practically a sale by sample.^{46c} If a sample is shown but the buyer examines the bulk for himself, there is no implied warranty that the bulk is like it.^{46d} The implied warranty extends only to identity and quality, and not to the honesty of the packing.^{46e}

425. This exception to the general rule, although now firmly established, stands upon no principle. If the purchaser wants such a warranty, he should ask for it; and then the vendor will have an opportunity of saying whether he will make such a contract or not. The law now makes it for him without his consent; and he can only get rid of that result by taking the precaution to agree at the time of the sale that no contract which he does not make shall afterwards be implied against him. It would, I think, have been better had the maxim of *caveat emptor* been left unbroken."

⁴⁶ *Bradford v. Manly*, 13 Mass. 139.

^{46a} *Beirne v. Dord*, 5 N. Y. 95; 55 Am. Dec. 321; *Day v. Raguet*, 14 Minn. 282.

^{46b} *Hargous v. Stone*, 5 N. Y. 73; *Selser v. Roberts*, 105 Pa. St. 242; *Proctor v. Spratley*, 78 Va. 254; *Borthwick v. Young*, 12 Ont. App. 671.

^{46c} *Zabriskie v. Cent. Vt. R. Co.*, 131 N. Y. 72; *Harrow Spring Co. v. Whipple Harrow Co.*, 90 Mich. 147; 30 Am. St. Rep. 421; *Butterfield v. Herren*, 80 Wis. 240.

^{46d} *Salisbury v. Stainer*, 19 Wend. 159; 32 Am. Dec. 437; *Barnard v. Kellogg*, 10 Wall. 383.

^{46e} *Barnard v. Kellogg*, 10 Wall. 384.

On sale of *provisions* for immediate consumption, there is an implied warranty that they are wholesome,⁴⁷ but not so unless they are intended for immediate consumption, whether sold at wholesale or retail.⁴⁸

Merchantability.—Where the goods are not inspected nor open to inspection by the purchaser, there is generally an implied warranty that they are merchantable or saleable, whatever the quality may be. Especially is this true of goods manufactured by the seller, and so where the delivery is to be in the future.⁴⁹ Sometimes in the case of a manufacturer

⁴⁷ *Van Bracklin v. Fonda*, 13 Johns. 468; 7 Am. Dec. 339 (beef); *Hoover v. Peters*, 18 Mich. 51; *Sinclair v. Hathaway*, 57 Mich. 60; 58 Am. Rep. 327 (bread); note, 6 Am. Dec. 117.

⁴⁸ *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260; 16 Am. St. Rep. 753; *Howard v. Emerson*, 110 Mass. 321; 14 Am. Rep. 608 (live cow); *Giroux v. Stedman*, 145 Mass. 439; 1 Am. St. Rep. 472 (hog by farmer); *Moses v. Mead*, 1 Denio, 378; 43 Am. Dec. 676 (mess beef); *Humphreys v. Comline*, 8 Blackf. 516 (barrels of molasses); *Ryder v. Neitge*, 21 Minn. 70 (4,000 lbs. venison); *Ryan v. Ulmer*, 108 Pa. St. 332; 56 Am. Rep. 210; *Leopold v. VanKirk*, 27 Wis. 152; but *contra*: *Best v. Flint*, 58 Vt. 543; 56 Am. Rep. 570. Mr. Bennett doubts the existence of such warranty even of provisions for immediate consumption, unless the buyer "trusts to the judgment or selection of the seller" (Notes, Benj. Sales, 6th Am. ed., p. 648). But it should seem that even though the buyer selected a particular chicken from a lot, yet he could rely on an implied warranty that they were all wholesome. So in the case of vegetables, confectionery and ices, for example.

⁴⁹ *Howard v. Hoey*, 23 Wend. 350; 35 Am. Dec. 572; *Hood v. Bloch*, 29 W. Va. 245; *Holloway v. Jacoby*, 120 Pa. St. 583; 6 Am. St. Rep. 737; *Dushane v. Benedict*, 120 U. S. 630; *Gaylord Manuf. Co. v. Allen*, 53 N. Y. 515; *Brantley v. Thomas*, 23 Tex. 270; 73 Am. Dec. 264; *Murchie v. Cornell*, 155 Mass. 60; 14 Lawy. Rep. Ann. 492; 31 Am. St. Rep. 526.

this warranty has been implied even where there was an express warranty as to quality, but this is also denied.⁵⁰ The denial seems an extremely artificial distinction, at least in the case of oral sales and warranties where no question of parol evidence arises, for proof of one warranty does not naturally exclude the possibility of another, and the seller may be willing not only to warrant that the article is of a certain quality but that it shall sell readily. But no warranty of merchantability is implied where the goods are or are to be inspected, as for example where they are to be approved, "within three days after the delivery."^{50a}

5. *Fitness for particular use.*—When the buyer purchases for a particular use, from a merchant or manufacturer, and discloses it to the seller, and does not himself inspect or select, but relies solely on the seller's judgment to select, there is an implied warranty that the article is reasonably fit for that use.⁵¹ But if the buyer relies exclusively on his own judg-

⁵⁰ *Pro* : Wilcox v. Owens, 64 Ga. 601 ; Merriam v. Field, 24 Wis. 640 ; *con* : DeWitt v. Berry, 134 U. S. 306, citing Johnson v. Latimer, 71 Ga. 470 ; Cosgrove v. Bennett, 32 Minn. 371 ; Shepherd v. Gilroy, 46 Iowa, 193 ; McGraw v. Fletcher, 35 Mich. 104.

^{50a} Gentilli v. Starace, 133 N. Y. 140.

⁵¹ Morse v. Union Stock Yard Co., 21 Oreg. 289 ; 14 Lawy. Rep. Ann. 157 ("good beef cattle") ; Dushane v. Benedict, 120 U. S. 630 ; Brown v. Sayles, 27 Vt. 227 (wagon) ; Hoe v. Sanborn, 21 N. Y. 552 ; 78 Am. Dec. 163 (saws) ; Bragg v. Morrill, 49 Vt. 45 ; 24 Am. Rep. 102 (shaft), and note, 104 ; Rodgers v. Niles, 11 Ohio St. 48 ; 78 Am. Dec. 290 (steamboilers) ; Snow v. Schoemaker Manuf. Co., 69 Ala. 111 ; 44 Am. Rep. 509 (pianos) ; Gammell v. Gunby, 52 Ga. 504 (guano) ; Robson v. Miller, 12 S. C. 586 ; 32 Am. Rep. 518 (fertilizer) ; Lewis v. Rountree, 79 N. C.

ment, this warranty is not implied, except in the case of a manufacturer, although the seller knows it is bought for a particular use. If the purchaser gets exactly what he bought, and bought exactly what he gets, the risk of fitness is his own. If a special thing is ordered for a special purpose, and the exact thing ordered is furnished, there is no warranty of fitness implied from the seller's knowledge of the buyer's design.⁵² And even in the case of a manufacturer, if a specific article of a known and recognized kind and description is ordered and actually supplied, there is no implied warranty of fitness for the designed use, but only that it shall answer the description and be well made and of good materials.^{52a}

Usage.—A warranty may be implied, or perhaps

122 ; 28 Am. Rep. 309 ; *French v. Vining*, 102 Mass. 132 ; 3 Am. Rep. 440 (hay for feed, on which white paint had been spilt) ; *Gerst v. Jones*, 32 Gratt. 518 ; 34 Am. Rep. 773 (tobacco packing boxes) ; *Poland v. Miller*, 95 Ind. 387 ; 48 Am. Rep. 730 (whiskey barrels) ; *Tacoma Coal Co. v. Bradley*, 2 Wash. 600 ; 26 Am. St. Rep. 890 (fire brick) ; and see many cases cited by Mr. Bennett (Notes, *Benj. Sales*, 6th Am. ed., pp. 645, 646). Also the "seed cases" heretofore noticed.

⁵² *Deming v. Foster*, 42 N. H. 165 (oxen for farm-work) ; *Hight v. Bacon*, 126 Mass. 10 ; 30 Am. Rep. 639 (leather for shoes) ; *County, etc., Soc. v. Wade*, 12 Up. Can. Q. B. 614 (bull for breeding) ; *Scott v. Renick*, 1 B. Mon. 63 ; 35 Am. Dec. 177 (cow for breeding) ; *Kohl v. Lindley*, 39 Ill. 196 ; 89 Am. Dec. 294 (hay) ; *Cogel v. Kniseley*, 89 Ill. 598 (engine) ; *Armstrong v. Bufford*, 51 Ala. 410 (guano) ; *Tilton Safe Co. v. Tisdale*, 48 Vt. 83 (safe) ; *Port Carbon Iron Co. v. Groves*, 68 Pa. St. 149 ("A 1 pig iron") ; *Lukens v. Freund*, 27 Kans. 664 ; 51 Am. Rep. 429 (bran for cows into which copper clasps fell without seller's knowledge) ; *Seitz v. Brewers', etc., Co.*, 141 U. S. 510 (machine).

^{52a} *Goulds v. Brophy*, 42 Minn. 109 ; 6 Lawy. Rep. Ann. 392.

modified, enlarged or restricted, by a custom or usage so general in the particular business or locality as to indicate that the parties contracted with reference to it, when not unreasonable or unlawful. As for example, on a sale by sample of berries in bags, to show that the sample represented the average equality of the entire lot and not every bag.⁵³ But usage is not provable to show an implied warranty against latent defects nor against false packing on sale by sample.⁵⁴ Evidence of a custom to sell by sample is competent on the question whether the goods were so sold.⁵⁵ If a contract of sale is in writing, the facts that the sale was by sample and the goods were inferior thereto may not be proved by parol,⁵⁶ but such evidence would be competent to define the kind of goods to be delivered.⁵⁷

⁵³ *Schnitzer v. Oriental Print Works*, 114 Mass. 123 ; *Fatman v. Thompson*, 2 Disney, 482.

⁵⁴ *Dickinson v. Gay*, 7 Allen, 29 ; 83 Am. Dec. 656 ; *Barnard v. Kellogg*, 10 Wall. 388.

⁵⁵ *Atwater v. Clancy*, 107 Mass. 369.

⁵⁶ *Harrison v. McCormick*, 89 Cal. 327 ; 23 Am. St. Rep. 469 ; *Wiener v. Whipple*, 53 Wis. 298 ; 40 Am. Rep. 775.

⁵⁷ *Bradford v. Manly*, 13 Mass. 139 ("cloves") ; *Pike v. Fay*, 101 Mass. 134 ("white willow saplings").

CHAPTER III.

DELIVERY.

1. *As between the parties.*

Delivery is complete when the seller has done all that by the terms of the agreement he was to do, and a reasonable time has elapsed for the buyer to take possession. Then, and not till then, does the title pass so that the risk of loss or deterioration falls on the buyer.¹ If the goods have been separated or identified, by measurement, weighing, counting or setting apart, and are ready for the buyer to take them, this constitutes delivery, although they are still on the seller's premises.^{1a} Especially is this so when the buyer has paid or taken a bill of sale of the articles.² So where the articles are marked with the buyer's name and the price, and he promises to come shortly and pay and take them, title passes.³ So where the seller retains possession at the request of the buyer.⁴ So where goods sold at auction are

¹ *Danforth v. Walker*, 40 Vt. 257 (potatoes sold "in good condition but rotted before reasonable time for removal").

^{1a} *Middlesex Co. v. Osgood*, 4 Gray, 447 (manure waste); *Chamberlain v. Farr*, 23 Vt. 265; *Clark v. Greeley*, 62 N. H. 394. *Com. v. Hess*, 148 Pa. St. 98; 33 Am. St. Rep. 148.

² *McNamara v. Edmister*, 11 Hun, 597.

³ *Merrill v. Parker*, 24 Me. 89 (bureau).

⁴ *Goddard v. Binney*, 115 Mass. 450; 15 Am. Rep. 112 (wagon); *Barrett v. Goddard*, 3 Mason, 107 (cotton); *Means v.*

pointed out and the buyer is told that he can take them away.⁵ So title passes when the seller deposits the goods at some place designated or agreed to by the buyer, without notice,⁶ but some cases hold this inapplicable where the property is not in existence at the time of sale.⁷ Title passes on delivery of a bill of sale of goods in possession of the seller's bailee.⁸ Absolute delivery to a carrier designated by the purchaser for transmission to him, passes title,⁹ and so if

Williamson, 37 Me. 556 (chaise); Pratt v. Maynard, 116 Mass. 388 (boiler); Partridge v. Wooding, 44 Conn. 277; Hull v. Hull, 48 Conn. 250; 40 Am. Rep. 165.

⁵ Beller v. Block, 19 Ark. 567.

⁶ Washburn Iron Co. v. Russell, 130 Mass. 543; Hunt v. Thurman, 15 Vt. 336; 40 Am. Dec. 683; Sanborn v. Benedict, 78 Ill. 309; Bloyd v. Pollock, 27 W. Va. 75; Sedgwick v. Cottingham, 54 Iowa, 512; Pacific Iron Works v. Long I. R. Co., 62 N. Y. 272; Rattary v. Cook, 50 Ala. 352 (on notice).

⁷ Rider v. Kelley, 32 Vt. 268; 76 Am. Dec. 176 (hops). Here the hops were to be delivered at Derby, and inspected. The court said: "But it is a contract to deliver at a future day property not then *in esse*; property which is to be thereafter produced by the cultivation of the earth, and which is to be of a specified character and description. It comes by analogy within the class of contracts for the manufacture of goods, and for their delivery at a future day. In such cases the authorities have abundantly established the general rule that the article must not only be made and offered to the vendee, but that he must accept of it, or it must be set apart for him by his consent, before the title to it will vest in him. And although the cases to some extent modify this general rule, as where the parties agree to treat the article as constructively delivered when finished, or as where the vendee finds the materials and superintends or specially directs in the process of manufacture, yet we find nothing to make this case an exception."

⁸ Wooley v. Edson, 35 Vt. 214; Clafin v. Boston, etc., R., 7 Allen, 341.

⁹ Odell v. Boston & M. R., 109 Mass. 50; and see note on Conditional Sales, *ante*.

the goods are to be "sent" and no carrier is designated, delivery to a carrier in the customary mode is effectual.¹⁰

But if by the terms of the contract, or the evident intent of the parties, anything further is to be done by the seller to complete the article, or to ascertain or identify it, or ascertain the price, as by separation, counting, measuring, weighing or inspecting, title does not pass until this is done.¹¹ But unless these acts are a condition precedent by the terms of the agreement or the manifest intention, title passes on delivery, although some such act remains to be done by the seller.¹² So if the article is accepted but remains in the hands of the seller to have some slight alteration made to fit it to the buyer's taste.¹³

Time.—The buyer is usually bound to come for and demand the goods before the seller is bound to deliver, and if he fails to do this within a reasonable time, the seller may be released, unless payment has been made.¹⁴ The seller is entitled to a reasonable time to deliver.^{14a}

¹⁰ *Magruder v. Gage*, 33 Md. 344; 3 Am. Rep. 177; *Kelsea v. Ramsey, etc., Manuf. Co.*, N. J. L. ; 26 Atl. Rep. 907; and see notes, *ante*, 89.

¹¹ *Rochester, etc., Oil Co. v. Hughey*, 56 Pa. St. 322; *Hubler v. Gaston*, 9 Oreg. 66; 42 Am. Rep. 794; and see notes, *ante*.

¹² *Burrows v. Whitaker*, 71 N. Y. 291; 27 Am. Rep. 42; and see notes, *ante*; *Morgan v. King*, 28 W. Va. 1; 57 Am. Rep. 633.

¹³ *Galvin v. MacKenzie*, 21 Oreg. 184 (a woman's gown).

¹⁴ *Coon v. Spaulding*, 47 Mich. 162.

^{14a} *Walden v. Murdock*, 23 Cal. 540; 83 Am. Dec. 135 (cattle on plains).

Place.—Generally delivery is to be made at the place where the goods are at the time of sale,¹⁵ but this may be varied by agreement, or by usage which binds the seller.¹⁶ If the buyer agrees to designate the place, but unreasonably neglects, title passes;¹⁷ and so if he positively notifies him not to deliver;¹⁸ and so if the article is fully ascertained and the price paid, and the seller merely said he would deliver at the cars free of charge.¹⁹ If the seller has an option of places, he must give notice of his election, or the risk is on him.^{19a}

Person.—A purchaser of goods ordered to be shipped directly to himself, is not bound by shipment to a third person, without opportunity for inspection.^{19b}

Manner.—On the sale of a quantity of grain, it is competent to prove a custom to deliver in sacks instead of bulk;²⁰ and that the seller should pay freight.^{20a} Delivery of the agreed weight of coffee, but in a fewer number of parcels than that contracted for, does not excuse acceptance, and so of goods of

¹⁵ *Gray v. Walton*, 107 N. Y. 254.

¹⁶ *Council Bluffs Iron Co. v. Cuppey*, 41 Iowa, 104; *Steel Works v. Dewey*, 37 Ohio St. 242; *Smith v. Wheeler*, 7 Oreg. 49; 33 Am. Rep. 698; *Corwith v. Colter*, 82 Ill. 585.

¹⁷ *Hunter v. Wetsell*, 84 N. Y. 549; 38 Am. Rep. 544.

¹⁸ *Windmuller v. Pope*, 107 N. Y. 674.

¹⁹ *Terry v. Wheeler*, 25 N. Y. 520.

^{19a} *Taylor v. Cole*, 111 Mass. 363.

^{19b} *Sun Pub. Co. v. Minn. Type F. Co.*, 22 Oreg. 49.

²⁰ *Robinson v. U. S.*, 13 Wall. 363.

^{20a} *Howe v. Hardy*, 106 Mass. 329.

the exact kind ordered but packed in boxes of an unaccustomed style.²¹

Part delivery.—If the seller, at the buyer's request, delivers part of an entire quantity bargained for, to be delivered at once, and the buyer refuses the rest because the stipulated time has passed, the seller may recover *pro tanto*; ^{21a} but it would be otherwise if the part delivery was made without such request.^{21b}

2. *As against the seller's creditors.*—A sale in good faith, but without sufficient delivery, although the title may pass as between the parties, may still not be operative against the seller's creditors; ²² as in case of the mere delivery of a bill of sale.²³ It is ordinarily held that there must be a visible change of possession, in the absence of which the creditor may reasonably presume the title still to be in the seller. This is especially important in the case of parties who are relatives and occupy the same house or the same premises where the property is.²⁴ Some courts

²¹ O'Donohue v. Leggett, 134 N. Y. 40; Forke v. Meacham Arms Co., 19 So. W. Rep. 550.

^{21a} Avery v. Willson, 81 N. Y. 341; 37 Am. Rep. 503; Churchill v. Holton, 38 Minn. 519.

^{21b} Kein v. Tupper, 52 N. Y. 553.

²² Shumway v. Rutter, 7 Pick. 56; Fairfield Bridge Co. v. Nye, 60 Me. 372; Morgan v. Taylor, 32 Tex. 363.

²³ Dempsey v. Gardner, 127 Mass. 381; 34 Am. Rep. 389; Cobb v. Haskell, 14 Me. 303; 31 Am. Dec. 56.

²⁴ McKee v. Garcelon, 60 Me. 165; 11 Am. Rep. 200 (husband and wife, sale of cattle on farm); Wheeler v. Selden, 63 Vt. 429; 25 Am. St. Rep. 771 (husband and wife). See McClure v. Forney, 107 Pa. St. 415. And see generally as to the necessity for visible change of possession, Allen v. Agee, 15 Oreg. 551; 3

however hold that a sale in good faith, without delivery, is as valid against creditors as against the seller himself; ²⁵ and with a good show of reason, because the creditor is not injured by a sale in good faith, for it is a mere exchange by the seller of one species of property for another. And the sale is valid against creditors if they knew of it.²⁶ As to creditors, delivery need not be immediate; it may be within a reasonable time.²⁷ And where the price has been paid, slight acts will make out a delivery good as against creditors. As by declaration of the seller or delivery of a key to the article or the place where it is stored.²⁸ Delivery to a common carrier for the buyer is valid against creditors.²⁹ If the goods are in the hands of the seller's bailee, notice to him of the sale, and his readiness and willingness to deliver, are sufficient against creditors; ³⁰ but to have this effect, the notice must

Am. St. Rep. 206; *Stephens v. Gifford*, 137 Pa. St. 219; 21 Am. St. Rep. 868; *Renninger v. Spatz*, 128 Pa. St. 524; 15 Am. St. Rep. 692; *Pearson v. Quist*, 79 Iowa, 54.

²⁵ *Meade v. Smith*, 16 Conn. 346.

²⁶ *Ludwig v. Fuller*, 17 Me. 162.

²⁷ *Kleinschmidt v. McAndrews*, 117 U. S. 282; *Webster v. Anderson*, 42 Mich. 554; 36 Am. Rep. 452 (farmer's laborer accepted hogs in payment, and allowed them to remain in pasture till he could resell).

²⁸ *Shumway v. Rutter*, 8 Pick. 443; 19 Am. Dec. 340; *Phelps v. Cutler*, 4 Gray, 137; *Calkins v. Lockwood*, 17 Conn. 154; 42 Am. Dec. 729; *Packard v. Dunsmore*, 11 Cush. 282 (key of building); *Benford v. Schell*, 55 Pa. St. 393 (key of safe) "no such change of possession as will defeat the fair and honest object of the parties is required." *Renninger v. Spatz*, *supra*.

²⁹ *Lumber Co. v. Hardware Co.*, 53 Ark. 196.

³⁰ *Tuxworth v. Moore*, 9 Pick. 347; *Campbell v. Hamilton*,

precede the creditors' levy.³¹ Other courts however hold the notice unnecessary,³² especially, but not exclusively, in the case of ponderous articles. It is difficult indeed to see what influence the weight or bulk can have on the question of notice, and it is almost equally difficult to see what notice has to do with the question at all. It can only operate as evidence of intention, for the bailee is but the seller's agent, and if the intention can be proved in any other way, it should be equally effectual. Manual delivery is not absolutely essential in the case of creditors; the article may remain in the seller's possession by agreement, as agent for the buyer,³³ even if the article was still to be furnished by the seller.³⁴ If payment of the price of an article to be manufactured is obtained before completion and delivery, by the seller's fraudulent representation that it is finished, title does not pass as against his creditors.^{34a}

Constructive or symbolical delivery.—In the case of ponderous or bulky articles, manual delivery is not necessary to pass title, but delivery may be sufficiently

63 Iowa, 293; *Stowe v. Taft*, 58 N. H. 445; *Hardy v. Potter*, 10 Gray, 89.

³¹ *Hallgarten v. Oldham*, 135 Mass. 1; *Hildreth v. Fitts*, 53 Vt. 684.

³² *Puckett v. Reed*, 31 Ark. 131; *Glasgow v. Nicholson*, 25 Mo. 29; *Zellner v. Mobley*, 84 Ga. 746; *Newcomb v. Cabell*, 10 Bush, 460; *Cofield v. Clark*, 2 Colo. 101.

³³ *Webster v. Anderson*, 42 Mich. 554; 36 Am. Rep. 452; *Hobbs v. Carr*, 127 Mass. 532; *Shaul v. Harrington*, 54 Ark. 305.

³⁴ *Thorndike v. Bath*, 114 Mass. 116; 19 Am. Rep. 318.

^{34a} *Shaw v. Smith*, 48 Conn. 306; 40 Am. Rep. 170.

evidenced by delivery of a bill of sale, a warehouse receipt, order, or a key of the place of storage, or by marking or otherwise designating or by pointing out the goods, and by declarations.³⁵ This principle has also been applied as to creditors.³⁶

Impracticable delivery.—If the goods are so situated that immediate delivery cannot be made without disproportionate expense, the purchaser has a reasonable time to take possession, even as against creditors,³⁷

³⁵ Bethel St. M. Co. v. Brown, 57 Me. 1; 99 Am. Dec. 572 (raft); Hall v. Richardson, 16 Md. 397; 77 Am. Dec. 303 (flour); Winslow v. Leonard, 24 Pa. St. 14; 62 Am. Dec. 354; Van Brunt v. Pike, 4 Gill. 270; 45 Am. Dec. 126 (pig iron); Smith v. Wheeler, 7 Oreg. 49; 33 Am. Rep. 698 (steam boiler); Calkins v. Lockwood, 17 Conn. 154; 42 Am. Dec. 729 (pile of iron); Pleasants v. Pendleton, 6 Rand. 473; 18 Am. Dec. 726 (lot of flour); Pollen v. LeRoy, 30 N. Y. 549 (cargo of lead); Cocke v. Chapman, 2 Eng. 197; 44 Am. Dec. 536. In the last case title to a negro slave was held to pass by delivery of a bill of sale. As to warehouse receipts, see Davis v. Russell, 52 Cal. 611; 28 Am. Rep. 647; Merch. Bank v. Hibbard, 48 Mich. 118; Burton v. Curyea, 40 Ill. 320; Allen v. Maury, 66 Ala. 10; Cochran v. Ripy, 13 Bush, 495; Second Nat. Bank v. Walbridge, 19 Ohio St. 424; 2 Am. Rep. 408; Whitlock v. Hay, 58 N. Y. 484.

³⁶ Leonard v. Davis, 1 Black, 477; Thompson v. Balt., etc., R. Co., 28 Md. 396; Bethel Steam Mill Co. v. Brown, *supra*; Tognini v. Kyle, 17 Nev. 209; 45 Am. Rep. 444 (charcoal in pits marked with buyer's name); Hayden v. Demets, 53 N. Y. 426. But *contra*, as to a mere bill of sale of cattle, although their mark is described in it and the branding-iron is delivered; Walden v. Murdock, 23 Cal. 540; 83 Am. Dec. 135.

³⁷ Kingsley v. White, 57 Vt. 565 (where saw-logs were inaccessible until the ground froze); Badlam v. Tucker, 1 Pick. 389; 11 Am. Dec. 202 (goods at sea); Conrad v. Atlantic Ins. Co., 1 Peters, 386; Dawes v. Cope, 4 Binn. 258; Ricker v. Cross, 5 N. H. 570; 22 Am. Dec. 480 (chaise and harness in hands of a hirer at a distance); Walden v. Murdock, 23 Cal. 540; 83 Am. Dec. 135 (cattle straying on plains).

but he must exercise his right within a reasonable time.³⁸ In such cases part delivery may answer for the whole.³⁹ There may be a constructive delivery of a *growing crop*, short of putting the buyer in possession of the land,⁴⁰ as by indicating part of a field of corn sold by cutting off the tops of the separating rows,⁴¹ or by giving all the possession possible,⁴² but not so, it seems, by delivering a handful of grass on a sale of the crop.⁴³ Title to standing trees, to be cut by the buyer, passes on cutting.⁴⁴ A contract of sale of colts, to be foaled by the seller's mares and

³⁸ *Putnam v. Dutch*, 8 Mass. 287; *Veazie v. Somerby*, 5 Allen, 281.

³⁹ *Shurtleff v. Willard*, 19 Pick. 210; *Boynton v. Veazie*, 24 Me. 286.

⁴⁰ *Smith v. Champney*, 50 Iowa, 174; *Noble v. Smith*, 2 Johns. 56; 3 Am. Dec. 399.

⁴¹ *Graff v. Fitch*, 58 Ill. 373; 11 Am. Rep. 85.

⁴² *Thompson v. Wilhite*, 81 Ill. 357; *Cummins v. Griggs*, 2 Duvall, 87; 87 Am. Dec. 482. See *Bellows v. Wells*, 36 Vt. 600.

⁴³ *Lamson v. Patch*, 5 Allen, 586; 81 Am. Dec. 765. And see *Stone v. Peacock*, 35 Me. 386. holding that manual possession is essential as to creditors. In *Samson v. Patch*, the grass was but six inches high, and the court said: "It is said that the symbolical delivery was all which the nature of the case would admit; and several cases have been cited in argument in which such a delivery has been held to be sufficient. But these are all cases of actual chattels, as logs in a boom, or in a river, or the like; where the thing to be delivered was capable of possession by one party as much as by the other: and where, by the intent and understanding of the parties, the delivery made was intended to transfer the immediate unqualified dominion of the property to the vendee. But in this case the grass was not fit to cut, and was not intended to be cut until it should have grown."

⁴⁴ *Yale v. Seely*, 15 Vt. 221.

kept in his stables under the buyer's care, is good as against creditors.^{44a}

Second bona fide purchasers have at least equal rights with creditors.⁴⁵ On principle it would seem that their rights should be superior, at least where they have paid the price for them, for they have parted with money on the faith of the first sale, which is not true of creditors. An assignee in bankruptcy has not the standing of a purchaser or creditor.⁴⁶

^{44a} Hull v. Hull, 48 Conn. 250 ; 40 Am. Rep. 165.

⁴⁵ Winslow v. Leonard, 24 Pa. St. 14.

⁴⁶ Dugan v. Nichols, 125 Mass. 43.

CHAPTER IV.

ACCEPTANCE.

THE question of acceptance is chiefly important in connection with the statute of frauds, and this has been discussed. See *ante*, p. 49.

At common law a formal acceptance is not essential to pass the title and perfect the seller's remedies, if the seller has done all that the contract bound him to do.¹ A formal acceptance is mainly important therefore to estop the buyer from objecting to the goods or refusing to make payment for them.

The buyer is entitled to a reasonable time after receipt to inspect the goods and see if they answer the contract, and to reject them if they do not.² But receipt becomes acceptance if this right is not exercised and notified to the seller within a reasonable time,³ and the buyer cannot afterward change his

¹ *Nichols v. Morse*, 100 Mass. 523; *Barton v. McKelway*, 22 N. J. L. 165; *Schneider v. C. P. Ry. Co.*, 20 Oreg. 172.

² *Pierson v. Crooks*, 115 N. Y. 539; 12 Am. St. Rep. 831; *Diversy v. Kellogg*, 44 Ill. 154; 92 Am. Dec. 154; *McNeal v. Braun*, 53 N. J. L. 617; 26 Am. St. Rep. 441.

³ *Ibid.*; *Studer v. Bleistein*, 115 N. Y. 317; *Doane v. Dunham*, 79 Ill. 131; *Hirshhonn v. Stewart*, 49 Iowa, 418; *Boughton v. Standish*, 48 Vt. 594; *Henkel v. Welsh*, 41 Mich. 665; *Watkins v. Paine*, 57 Ga. 50; *Cleveland Stove Co. v. Hovey*, 26 Neb. 628.

mind and reject the goods.⁴ His putting his objection on a particular ground may perhaps estop him from raising any other.⁵ He is not bound to accept less than the agreed quantity or before the stipulated time,⁶ but if he does accept less than the agreed quantity, and they prove inferior to the agreed quality, he cannot therefore reject the residue unless they also prove inferior.⁷ He is bound by his acceptance of part of an entire order, after reasonable opportunity to examine them,⁸ although the rest are not delivered within the stipulated time;⁹ but acceptance of one class of goods does not conclusively bind him subsequently to accept another class at different

⁴ *Carondelet Iron Works v. Moore*, 78 Ill. 69; *Theilen v. Rath*, 80 Wis. 263.

⁵ *Johnson v. Oppenheim*, 55 N. Y. 291. This was a case of landlord and tenant, but the following reasoning seems applicable: "The principle is that when some formal act or acts are to be performed by a party as a condition precedent to some right, or to perfect a right of action or property, and the act as performed is defective or imperfect, and the adverse party, whose right it is to object and insist upon a more perfect compliance with the condition, takes no objection to the manner of its performance, but accepting the performance as perfect, places his objection to the claim and right asserted to another distinct and independent ground, he is held to have waived all objection to the formal and technical defects. Or when a single objection to the performance is taken, and the party is silent as to all others, they are deemed to be waived. The rule rests upon the ground that the party by his silence has misled his adversary, and not having spoken when he ought, shall not be permitted to speak when he would."

⁶ *Kein v. Tupper*, 52 N. Y. 553.

⁷ *Cahen v. Platt*, 69 N. Y. 348; 25 Am. Rep. 203.

⁸ *Gaylord Manuf. Co. v. Allen*, 53 N. Y. 515.

⁹ *Avery v. Willson*, 81 N. Y. 341; 37 Am. Rep. 503.

prices, although both were ordered at once.¹⁰ And he is not bound by receipt and retention of part when he stipulates that it shall not be considered an acceptance.¹¹ The buyer is not bound to accept more or less than the stipulated quantity,¹² nor to select or separate the proper amount or kind from a larger quantity,¹³ unless there is a custom to the contrary and the goods are of uniform quality and the labor of separation is not onerous.¹⁴ Acceptance may be conclusively inferred as to *quality* by receipt and retention without objection,¹⁵ but not so as to *quantity* without proof that the buyer received and used all the goods, or did something else equally indicative of a waiver of his right to object.^{15a}

¹⁰ *Pierson v. Crooks*, 115 N. Y. 539; 12 Am. St. Rep. 831.

¹¹ *Blackwood v. Cutting, etc., Co.*, 76 Cal. 212; 9 Am. St. Rep. 199.

¹² *Perry v. Mt. Hope Iron Co.*, 16 R. I. 318; *Barton v. Kane*, 17 Wis. 38; 84 Am. Dec. 728.

¹³ *Croninger v. Crocker*, 62 N. Y. 151.

¹⁴ *Brownfield v. Johnson*, 128 Pa. St. 268.

¹⁵ *Small v. Stevens*, 65 N. H. 209; *Barton v. Kane*, 17 Wis. 38; 84 Am. Dec. 728. The latter was a case of sale by sample, and the court said: "When goods ordered prove defective in quality, it is in general incumbent on the purchaser to notify the seller of his non-acceptance on that ground, else he is deemed to waive the objection, and to consent to keep and pay for them according to the terms specified. In such case, it is considered sufficient evidence of acceptance that the purchaser has not returned or offered to return the goods or notified the seller of his non-acceptance."

^{15a} *Barton v. Kane*, *supra*: "Defects in quality may exist without the seller's knowledge. There is nothing in such circumstance which necessarily implies bad faith or a disposition on his part not to fulfill the contract. But where he knowingly sells more or less goods than are ordered, he is guilty of

The question of acceptance is generally a question of fact, and acceptance may be indicated by a variety of circumstances, chiefly by dealing with the property as owner after a reasonable opportunity for inspection.¹⁶

A common carrier is not an agent to accept, although appointed and authorized to receive.¹⁷ This is because the buyer has a reasonable time after the goods come to his hands to inspect and accept or reject them.

an intentional violation of the contract which he undertakes to perform, and his conduct savors of bad faith ; and it would seem that he has no right to presume that the purchaser will accept, or to rely on notice of refusal."

¹⁶ *Taylor v. Mueller*, 30 Minn. 343 ; 44 Am. Rep. 199 ; and see generally, *Treadwell v. Reynolds*, 39 Conn. 31 ; *Knoblauch v. Kronschnabel*, 18 Minn. 300 ; *Pennell v. McAfferty*, 84 Ill. 364 ; *Delamater v. Chappell*, 48 Md. 244 ; *Shipman v. Graves*, 41 Mich. 675 ; *Waters Heater Co. v. Mansfield*, 48 Vt. 378 ; *Gowing v. Knowles*, 118 Mass. 232 ; *Belt v. Stetson*, 26 Minn. 411 ; *Thompson v. Dymont*, 12 Ont. App. 659 ; *Reed v. Randall*, 29 N. Y. 358 ; 86 Am. Dec. 305 ; *McIntyre v. Kline*, 30 Miss. 361 ; 64 Am. Dec. 163.

¹⁷ *Allard v. Greasert*, 61 N. Y. 1 ; *Knight v. Mann*, 120 Mass. 219 ; *Taylor v. Mueller*, 30 Minn. 343 ; 44 Am. Rep. 199. See *ante*, p. 50.

CHAPTER V.

PAYMENT AND TENDER.

PAYMENT.

ORDINARILY the buyer is not entitled to possession of the property sold until he makes payment. But this may be varied by agreement, general usage in the particular business, or former dealings between the parties. Payment involves both an offer and an acceptance. So merely depositing the money in a bank in the creditor's name, without his authority or ratification, is no payment, and the money is at the debtor's risk.¹ So an offer is not payment unless accepted, although it may be good as a tender.²

Payment in cash.—The creditor has a general right to demand payment in legal tender,^{2a} which Congress may make what it pleases,³ but the parties may agree

¹ *Freeholders v. Thomas*, 20 N. J. Eq. 39; *St. Paul Nat. Bk. v. Cannon*, 46 Minn. 95; 24 Am. St. Rep. 189 (deposit of money to pay note).

² *Sweet v. Titus*, 67 Barb. 327; *Edgerton v. Hodge*, 41 Vt. 676.

^{2a} *Lord v. Burbank*, 18 Me. 178 (creditor entitled to specie from his attorney who had collected a claim in bank-notes).

³ *Juilliard v. Greenman*, 110 U. S. 421

on the medium of payment, as for example, gold ; and this will be recognized by the court and effectuated in judgment.⁴

Bank bills.—The acceptance of counterfeit or worthless bank bills or base coin is no payment, though made in good faith,⁵ even as between agent and principal.⁶ It seems to be the balance of opinion that unless counterfeit money, paid in good faith, is returned, or its character notified to the debtor within a reasonable time, it will constitute a valid payment.⁷ The weight of opinion seems also to be that if the bank bills are genuine, but the bank has failed, or their value is depreciated, the loss is on the debtor.⁸

⁴ *Bronson v. Rodes*, 7 Wall. 229.

⁵ *Markle v. Hatfield*, 2 Johns. 455 ; 3 Am. Dec. 446 ; *Eagle Bank v. Smith*, 5 Conn. 71 ; 13 Am. Dec. 37 ; *Goodrich v. Tracy*, 43 Vt. 314 ; 5 Am. Rep. 281 ; *Bank v. Buchanan*, 87 Tenn. 32 ; 10 Am. St. Rep. 617.

⁶ *U. S. v. Morgan*, 11 How. 154.

⁷ *Curcier v. Pennock*, 14 S. & R. 51 ; *Pindall v. Northw. Bk.*, 7 Leigh, 617 ; *Atwood v. Cornwall*, 28 Mich. 342 ; 15 Am. Rep. 219 ; *Wingate v. Neidlinger*, 50 Ind. 526 ; *Thomas v. Todd*, 6 Hill, 340 ; *Simms v. Clark*, 11 Ill. 137. *Contra*: *Brewster v. Burnett*, 125 Mass. 68 ; 28 Am. Rep. 203.

⁸ *Roberts v. Fisher*, 43 N. Y. 159 ; 3 Am. Rep. 680 ; *Wainwright v. Webster*, 11 Vt. 576 ; 34 Am. Dec. 707 ; *Townsend v. Bank of Racine*, 7 Wis. 185 ; *Frontier Bank v. Morse*, 22 Me. 88 ; 38 Am. Dec. 284 ; *Harley v. Thornton*, 2 Hill (S. C.) 509 ; *Magee v. Carmack*, 13 Ill. 289 ; *Fogg v. Sawyer*, 9 N. H. 365 ; *Honore v. Colmesnil*, 1 J. J. Marsh, 523 ; *Aldrich v. Jackson*, 5 R. I. 218 ; *Westfall v. Braley*, 10 Ohio St. 188 ; 75 Am. Dec. 509 ; *contra*: *Edmunds v. Digges*, 1 Gratt. 359 ; 42 Am. Dec. 561 ; *Corbit v. Bank of Smyrna*, 2 Harr. 235 ; 30 Am. Dec. 635 ; *Young v. Adams*, 6 Mass. 185 ; *Lowrey v. Murrell*, 2 Port. 280 ; *Scruggs v. Gass*, 8 Yerg. 175 ; 29 Am. Dec. 114 ; *Ware v. Street*, 2 Head, 609 ; 75 Am. Dec. 755.

Payment in Confederate money has been held valid in those States.^{8a}

Check or draft.—A worthless check is no payment.⁹ But if good at the time and loss occurs through unreasonable delay in presentation, it falls on the creditor,¹⁰ and unreasonable delay in returning a dishonored check may operate as payment.¹¹ It is generally held that a check is not even *prima facie* payment, and that the creditor may recover for the price unless the debtor shows that the check was paid or that it would have been paid if duly presented.¹² Certification of the check discharges the drawer.¹³

Debtor's note or bill.—In the absence of special agreement this is generally esteemed no payment, not even *prima facie*; and this is right in principle, for the debtor's written promise can hardly be more effectual than his implied promise or his express oral promise.¹⁴

^{8a} *Piegar v. Twohig*, 37 Tex. 225; *Ritchie v. Sweet*, 32 Tex. 333; 5 Am. Rep. 245.

⁹ *Fleig v. Sleet*, 43 Ohio St. 51; 54 Am. Rep. 800, and cases cited.

¹⁰ *Taylor v. Wilson*, 11 Metc. 44; 45 Am. Dec. 180; *Hodgson v. Barrett*, 33 Ohio St. 63; 31 Am. Rep. 527; *Syracuse, etc., R. Co. v. Collins*, 3 Lans. 33; *Thayer v. Peck*, 93 Ill. 357; *McIntyre v. Kennedy*, 29 Pa. St. 448.

¹¹ *Smith v. Miller*, 43 N. Y. 171; 3 Am. Rep. 690.

¹² *Bradford v. Fox*, 38 N. Y. 289; *Kermeyer v. Newby*, 14 Kan. 164; *Phillips v. Bullard*, 58 Ga. 256. *Contra*: *Broughton v. Silloway*, 114 Mass. 71; 19 Am. Rep. 312.

¹³ *First Nat. Bk. v. Leach*, 52 N. Y. 350; 11 Am. Rep. 708. *Contra*: *Andrews v. German Nat. Bk.*, 9 Heisk. 211; 24 Am. Rep. 300.

¹⁴ *Tobey v. Barber*, 5 Johns. 68; 4 Am. Dec. 326, and Mr. Bennett's note (Benj. Sales, 6th Am. ed., p. 725-6), citing cases from twenty-five States.

A few courts hold that the debtor's negotiable note is *prima facie* payment.¹⁵

Third person's note.—If valid, although not paid, yet taken as agreed payment, and only in that case, this operates as payment.¹⁶ Otherwise, if void, as for incompetency or usury.¹⁷ In Massachusetts, the acceptance of a valid note of a third person is *prima facie* payment of a pre-existing debt,¹⁸ but in New York the rule is that it is *prima facie* only when accepted at the time of contracting the debt, and the contrary presumption prevails when it is taken afterwards.¹⁹ A third person's check is presumptively only conditional payment, but this may be rebutted by proof of the course of dealing between the parties.^{19a} Where the buyer directs the seller to deliver to his agent and gives the latter the money for payment, and the seller accepts his check for the price, the buyer is discharged.^{19b}

¹⁵ Butts v. Dean, 2 Metc. 76 ; 35 Am. Dec. 389 ; and cases cited by Mr. Bennett from Maine, Vermont, Indiana and Louisiana (Benj. Sales, 6th Am. ed. p. 724-5.

¹⁶ Conkling v. King, 10 N. Y. 440. A mere receipt in full does not amount to such agreement. Vail v. Foster, 4 N. Y. 312.

¹⁷ Little v. American Co., 67 Ind. 67 ; Cook v. Barnes, 36 N. Y. 520. So in case of subsequent insolvency of a maker solvent at the time. Benedict v. Field, 16 N. Y. 595 ; but *contra* : Bicknell v. Waterman, 5 R. I. 43.

¹⁸ Ely v. James, 123 Mass. 37.

¹⁹ Noel v. Murray, 13 N. Y. 167. Mr. Daniel approves this view, 2 Neg. Inst., § 1260, 1262, 1264.

^{19a} Briggs v. Holmes, 118 Pa. St. 283 ; 4 Am. St. Rep. 597 ; 131 Pa. St. 233 ; 17 Am. St. Rep. 804 ; Nat. Bank v. Chicago, etc., R. Co., 44 Minn. 224 ; 20 Am. St. Rep. 566.

^{19b} Cleveland v. Pearl, 63 Vt. 127 ; 25 Am. St. Rep. 748.

Specific articles.—An agreement for payment in specific articles makes the contract one of barter, but if the articles are not duly delivered or tendered, the debt becomes payable in money.²⁰

Set-off.—In the absence of statute to the contrary, the debtor may not set off or counter-claim a demand of his own, it has been said, and the seller may retake the goods.²¹ This would not be so in the “Code States.”

By mail.—Money expressly or impliedly authorized to be sent by mail, or in any other mode, being so sent is at the creditor's risk,²² but in the absence of such authority or authoritative general usage, it is at the debtor's risk.²³ Mailing however is *prima facie* evidence of receipt.²⁴

To agents.—An agent, in possession and authorized to sell and deliver, may generally receive payment,²⁵

²⁰ Perry v. Smith, 22 Vt. 301 ; Stone v. Nichols, 43 Mich. 16.

²¹ Wabash Elevator Co. v. First Nat. Bank, 23 Ohio St. 311 ; Allen v. Hartfield, 76 Ill. 358.

²² Gurney v. Howe, 9 Gray, 404 ; 69 Am. Dec. 299 ; Palmer v. Phoenix M. Ins. Co., 84 N. Y. 63 ; Townsend v. Henry, 9 Rich. L. 318.

²³ Buell v. Chapin, 99 Mass. 594 ; 97 Am. Dec. 58 ; First Nat. Bk. v. McManigle, 69 Pa. St. 156 ; 8 Am. Rep. 236 ; Williams v. Carpenter, 36 Ala. 9 ; 76 Am. Dec. 316 ; Holland v. Tyus, 56 Ga. 56.

²⁴ Austin v. Holland, 69 N. Y. 571 ; 25 Am. Rep. 246 ; Huntley v. Whittier, 105 Mass. 391 ; 7 Am. Rep. 536. *Contra* : Sullivan v. Kuykendall, 82 Ky. 483 ; 56 Am. Rep. 901, saying the presumption ought not to arise in ordinary business transactions, and especially between men whose business does not require them to watch the arrival of the mails.

²⁵ Whiton v. Spring, 74 N. Y. 173 ; Rice v. Groffmann, 56 Mo.

and not having the goods, may receive payment, if such is the usage recognized by his principal,²⁶ or if such is the general usage, or in harmony with previous dealings, or the agent is in any way held out as authorized.²⁷ But mere power to sell does not imply authority to take pay, and so brokers and traveling agents, simply authorized to sell, and not having possession of the goods, may not collect.²⁸

434 ; *Bailey v. Pardridge*, 134 Ill. 188 ; but not for his samples, *Kohn v. Washer*, 64 Tex. 131 ; 53 Am. Rep. 745.

²⁶ *Meyer v. Stone*, 46 Ark. 210 ; 55 Am. Rep. 577.

²⁷ *Howe Machine Co. v. Ballweg*, 89 Ill. 318.

²⁸ *Higgins v. Moore*, 34 N. Y. 417 ; *McKindly v. Dunham*, 55 Wis. 515 ; 42 Am. Rep. 740 ; *Butler v. Dorman*, 68 Mo. 298 ; 30 Am. Rep. 795 ; *Kornemann v. Monaghan*, 24 Mich. 36 ; *Clark v. Smith*, 88 Ill. 298 ; *Seiple v. Irwin*, 30 Pa. St. 513 ; *Chambers v. Short*, 79 Mo. 204 ; *Law v. Stokes*, 32 N. J. L. 249 ; 90 Am. Dec. 655. A few cases are to the contrary : *Hoskins v. Johnson*, 5 Sneed, 469 ; *Trainor v. Morrison*, 78 Me. 160 ; 57 Am. Rep. 790 ; *Putnam v. French*, 53 Vt. 402 ; 38 Am. Rep. 682 (even though the bill rendered contained the words, "payable at office"). In *Simon v. Johnson*, 101 Ala. 368, the court say :

"The decided weight of authority—indeed, well-nigh all the adjudged cases—supports the proposition that a traveling salesman of merchandise, making sales by sample on credit or for cash, to be paid on receipt of the goods or the invoice of them, has no implied authority to collect the money agreed to be paid from the purchaser, 2 Amer. & Eng. Enc. Law, p. 355, and notes ; *Kane v. Barstow*, 42 Kan. 465 ; 16 Am. St. Rep. 490, and note on page 494 ; *McKindly v. Dunham*, 55 Wis. 515 ; *Kohn v. Washer*, 64 Tex. 131 ; *Butler v. Dorman*, 68 Mo. 298 ; 30 Am. Rep. 795 ; *Law v. Stokes*, 32 N. J. 249 ; 90 Am. Dec. 655 ; *Kornemann v. Monaghan*, 24 Mich. 36 ; *Clark v. Smith*, 88 Ill. 298 ; *Higgins v. Moore*, 34 N. Y. 417 ; *Greenleaf v. Egan*, 30 Minn. 316 ; *Seiple v. Irwin*, 30 Pa. St. 513. The particular facts of the Maine case relied on by counsel for appellee prevent it from being an authority against the proposition just stated. The opinion in that case indeed recognizes the soundness of the rule declared in *Higgins v. Moore* and *McKindly v. Dunham*, *supra*, and in

The agent can take only money,²⁹ and the death of his principal terminates his authority, and if a payment is

effect bases the conclusion that payment was well made to the agent, mainly, if not entirely, on the facts that the 'agent assumed to complete a contract of sale, specific in terms, stipulating that payment was to be made to himself,' and that 'after the goods had been delivered, he presented for payment a bill, made upon a genuine "billhead" of his principal.' Neither of these facts is in the present case or was involved in the cases cited. Without committing ourselves to the effect accorded them by the Maine court, it is readily conceivable that there is much reason for according them an important influence in shaping the conclusion reached. *Trainor v. Morison*, 78 Me. 160. The Vermont case, relied on by the appellee, involved the sale by one Allen, who was in fact a traveling salesman for plaintiff's firm, but who represented himself to be a member of the partnership, and upon that representation, made the contract of sale with the defendants. This contract embodied a stipulation that defendants should pay Allen for the goods when he should come to their city on his next trip, in about three months; and the decision is based on this express stipulation for payment to Allen, in connection with the consideration that defendants had a right, under all the circumstances, to rely upon Allen's making a truthful report of the terms of the sale, and to suppose that the goods were sent pursuant to the contract as made—a view which finds nothing in the present case to rest upon. *Putnam v. French*, 53 Vt. 402. The only case to which we have been referred, or which our own investigation has disclosed, that really sustains the position taken for appellee, is that of *Collins v. Newton*, 7 Baxt. 269. No great degree of investigation or consideration is evinced by the opinion of the court, and in reaching the conclusion announced, no account seems to have been taken of the distinction, undoubtedly very important, between agents to make contracts of sale by sample to be filled through a delivery of the goods by the principal, time being given for payment, or payment to be made on delivery by the principal, and agents who, having the property of the principal in their possession for that purpose, sell and presently deliver it to the purchaser. The question has not been decided in Ala-

²⁹ *Aultman v. Lee*, 43 Iowa, 404; *Mann's Exrs v. Robinson*, 19 W. Va. 49; 42 Am. Rep. 771.

subsequently made to him, even in ignorance of the death, and the money is not accounted for, the debtor must respond again.³⁰ It would seem that payment after actual revocation, but in ignorance thereof, should protect the debtor.³¹ Payment to the agent, in rea-

bama. We are content, however to follow the very numerous cases which hold that such an agent has no implied power to collect from purchasers for goods sold and delivered in the manner shown in this record. The agent has not the goods, and does not deliver them. *Prima facie*, his agency is discharged when he makes a contract of sale, and takes an order for delivery by the principal. The sole purpose of his itinerary is to induce parties having need of the wares in which his principal deals to buy them from the house he represents. In doing this, he in a sense has taken the place of ordinary advertisement, and orders through the mails to the wholesale dealer, which obtained in the course of such transactions before his day. Having done this in a given instance, at a particular place, and made report to his employer, he passes on, and it is the merest accident if he is again at that place at the time the bill falls due, or if the purchaser at such time knows his whereabouts. To hold that an agency simply to make and report such contracts of sale under these circumstances involves an agency to collect the contract price when the account matures,—a matter wholly beyond the exigencies of commerce, which brought these agencies into being, inconvenient of accomplishment, and entirely unnecessary, in such sort that it is to be assumed that the principal held the agent out as empowered to collect,—would be too radical a departure from elementary principles of the law of agency to be tolerated. To the contrary, we hold that a traveling salesman, making contracts of sale by sample, goods to be delivered by the principal, and the purchase money to be paid on delivery, or at any other time transpiring, or upon any other event happening in the future, is, upon these facts, and without more, wholly unauthorized to receive payment, and of consequence, that payment made to him will not discharge the debtor from his liability to the principal.”

³⁰ Clayton v. Merrett, 52 Miss. 353; Gale v. Tappan, 12 N. H. 145; 37 Am. Dec. 194. *Contra*: Cassiday v. McKenzie, 4 W. & S. 282; 39 Am. Dec. 76.

³¹ Packer v. Hinckley Locomotive Works, 122 Mass. 484.

sonable supposition that he was the principal, is valid.³²

By stranger.—Payment by an unauthorized stranger would not prevent the creditor from suing for the price, unless accepted, nor warrant a suit by the stranger against the debtor for reimbursement.³³

On Sunday.—A payment made and accepted on Sunday will prevent the creditor from maintaining an action for the price.³⁴

Appropriation.—If the creditor has more than one demand against the debtor, the latter may, when he makes the payment, and not afterward, designate the claim on which he makes it, and this will bind him.³⁵ If the debtor fails to do so, the creditor may apply it.³⁶ If neither applies it the law will apply it according to justice and equity, to elder items, to unsecured debts, or those due.³⁷

TENDER.

This is an act, which, unlike payment, requires the action of only one party; but it may be made by either, as of the goods by the seller with a demand

³² Eclipse Windmill Co. v. Thorson, 46 Iowa, 181; Peel v. Shepherd, 58 Ga. 365; Wright v. Cabot, 89 N. Y. 570; Dias v. Chickering, 64 Md. 348; 54 Am. Rep. 770.

³³ Neely v. Jones, 16 W. Va. 625; 37 Am. Rep. 794.

³⁴ Johnson v. Willis, 7 Gray, 164.

³⁵ Hubbell v. Flint, 15 Gray, 550; Caldwell v. Wentworth, 14 N. H. 431; Nat. Bank v. Bigler, 83 N. Y. 51.

³⁶ Haynes v. Nice, 100 Mass. 327; 1 Am. Rep. 109.

³⁷ Hersey v. Bennett, 28 Minn. 86; 41 Am. Rep. 271.

for payment, or of the price by the buyer with a demand for the goods. It means an offer of the article sold or the price agreed on, but in respect to the former the principles are sufficiently inferable from the discussion under Delivery, *ante*, p. 148.

A tender of payment generally must be made in currency legalized by the positive law of the country, such as the legal coinage or legalized national paper issues. So State bank-bills are not a legal tender even for a debt due the particular bank.³⁸ In like manner a counterclaim or note due from the creditor to the debtor is not a legal tender.³⁹ So of a check.^{39a} But unless objection is taken to the character of the tender at the time it is made, it is waived, and the objection may not afterward be raised,⁴⁰ as for example where the tender is made in the common currency of the community, without objection. In like manner an insufficiency in amount is waived by non-objection on that ground.⁴¹ But tender of part of an entire debt,

³⁸ *Moody v. Mahurin*, 4 N. H. 296; *Donaldson v. Benton*, 4 Dev. & Bat. 435; *Coxe v. State Bank*, 8 N. J. L. 172.

³⁹ *Cary v. Bancroft*, 14 Pick. 315; 25 Am. Dec. 393; *Barker v. Walbridge*, 14 Minn. 469; *Bellows v. Smith*, 9 N. H. 285.

^{39a} *Collier v. White*, 67 Miss. 133.

⁴⁰ *Ward v. Smith*, 7 Wall. 447; *Warren v. Mains*, 7 Johns. 476; *Snow v. Perry*, 9 Pick. 542; *Hoyt v. Byrnes*, 11 Me. 475; *Williams v. Rorer*, 7 Mo. 556; *Harding v. Com. Loan Co.*, 84 Ill. 251; *Towson v. Havre-de-Grace Bank*, 6 H. & J. 53; 14 Am. Dec. 254; *Brown v. Dysinger*, 1 Rawle, 408; *Wheeler v. Knaggs*, 8 Ohio, 169; *Ball v. Stanley*, 5 Yerg. 199; 26 Am. Dec. 263; *Seawell v. Henry*, 6 Ala. 226; *Fosdick v. Van Huse*, 21 Mich. 567.

⁴¹ *Oakland Bank v. Applegarth*, 67 Cal. 86.

where the debtor knows the exact amount, has been thought ineffectual.⁴²

The money must be *present, ready, produced, in sight*, and *offered*, unless production is waived. Mere words, or offers alone, or statements as to ability and willingness to pay, are not sufficient, although indicative of present possession of the money and intention to proffer it.⁴³ The *amount* must be stated, in addition to the production in sight and offer,⁴⁴ but it need not be counted.⁴⁵ The creditor may waive the production of the money by explicit words to that effect, or by an unqualified declaration that he will not accept it if produced.⁴⁶ But the waiver is not operative unless the other party had the ability to make present production of the money,⁴⁷ unless perhaps there is an explicit waiver of the necessity of present possession.⁴⁸

The tender must be *unconditional*.⁴⁹ So a tender

⁴² Wright v. Behrens, 39 N. J. L. 413; Nelson v. Robson, 17 Minn. 284.

⁴³ Breed v. Hurd, 6 Pick. 356; Fuller v. Little, 7 N. H. 535; Potts v. Plaisted, 30 Mich. 149; Harmon v. Magee, 57 Miss. 410; Bakeman v. Pooler, 15 Wend. 637; Sargent v. Graham, 5 N. H. 440; Town v. Trow, 24 Pick. 168.

⁴⁴ Knight v. Abbott, 30 Vt. 577; Mathewson v. Kelly, 24 Up. Can. C. P. 598.

⁴⁵ Behaly v. Hatch, Walker (Miss.), 369: 12 Am. Dec. 570.

⁴⁶ Selleck v. Tallman, 87 N. Y. 106; Hazard v. Loring, 10 Cush. 267; Sands v. Lyon, 18 Conn. 18; Berry v. Nall, 54 Ala. 451; Wheeler v. Knaggs, 8 Ohio, 172; Berthold v. Reyburn, 37 Mo. 595; Guthman v. Kearns, 8 Neb. 507.

⁴⁷ Eddy v. Davis, 116 N. Y. 247.

⁴⁸ Hall v. Norwalk F. Ins. Co., 57 Conn. 105.

⁴⁹ Brooklyn Bank v. DeGrauw, 23 Wend. 342; 35 Am. Dec. 569; Rose v. Duncan, 49 Ind. 269; Flake v. Nuse, 51 Tex. 98.

on condition that the creditor shall execute a receipt or release "in full," or a discharge, or cancel a mortgage, or that he shall take it "for his claim," or "in full payment of all claims," is invalid;⁵⁰ but if it is the statutory duty of the creditor to give a release, it may be demanded,⁵¹ and the demand of the property at the same time is not a condition.^{51 a}

The tender must be *kept good*, that is to say, if afterwards demanded, it must be ready.⁵² But one offer is enough, and the identical money need not be kept ready.⁵³ If suit is brought, to support a plea of

⁵⁰ *Wood v. Hitchcock*, 20 Wend. 47; *Hepburn v. Auld*, 1 Cranch, 321; *Forest Oil Co's Appeal*, 118 Pa. St. 138; 4 Am. St. Rep. 584; *Richardson v. Boston Chemical Laboratory*, 9 Met. 43; *Storey v. Krewson*, 55 Ind. 397; 23 Am. Rep. 668; *Tompkins v. Batie*, 11 Neb. 147; 38 Am. Rep. 361; *Draper v. Hitt*, 43 Vt. 439; 5 Am. Rep. 292.

⁵¹ *Balme v. Wambaugh*, 16 Minn. 116; *Salinas v. Ellis*, 26 S. C. 337.

^{51 a} *Moynaham v. Moore*, 9 Mich. 9; 77 Am. Dec. 468.

⁵² *Dodge v. Fearey*, 19 Hun, 277; *Town v. Trow*, 24 Pick. 168; *Parks v. Allen*, 42 Mich. 482; *Carr v. Miner*, 92 Ill. 604; *Gray v. Angier*, 62 Ga. 596.

⁵³ *McCalley v. Otey*, 90 Ala. 302. Mr. Bennett says (*Benj. Sales*, 6th Am. ed., note, p. 734), that it is unnecessary "that the same identical money must always be kept on hand." Citing *McCalley v. Otey*, 90 Ala. 302. This would seem reasonable. There is no particular virtue in keeping the very same coins or paper in waiting for the creditor, so long as the money is forthcoming on his subsequent demand. The sum of money must of course be immediately available. So if the debtor deposits the tendered money to his own use, and afterward draws out part of it, without having other money ready to supply its place when called for, the tender would fail. *Crain v. McGoon*, 86 Ill. 431; 29 Am. Rep. 37. A good test of the matter would seem to be this: if the debtor should preserve the identical money by special deposit in bank, and the creditor should come to the debtor and demand it, and the debtor should then draw

tender, the money must be paid into court for the plaintiff,⁵⁴ and the money then belongs to the plaintiff

from his pocket the proper amount in legal tender and offer it, would not that be a valid tender? It is true that the head-note of *Roosevelt v. Bull's Head Bank*, 45 Barb. 579, says that "if after tender made, the money tendered is used by the debtor in his business, and mingled with his other money, the tender is not valid," but the language of the court is, "it may be doubted whether," etc., as stated in the head-note, and afterward, "that the same bills should be brought into court" and the party "is bound to keep the money at all times ready," etc. And so in *Brooklyn Bank v. DeGrauw*, 23 Wend. 345, it is said, that the defendant must be "ready with the money tendered." These expressions do not necessarily imply the identical money. In *Sanders v. Bryer*, 152 Mass. 141; 9 Lawy. Rep. Ann. 255, it was held that where the money tendered was deposited in bank, to the debtor's account, without notice to the creditor, and afterward drawn out by the debtor and used in his business, the tender did not stop interest, although he was at all times ready to pay the amount on demand. This implies that there is no need of preserving the identical money. In *Aulger v. Clay*, 109 Ill. 493; *Park v. Wiley*, 67 Ala. 310; 109 Ill. 487; *McCalley v. Otey*, 90 Ala. 302, the court said: "Although the identical money tendered does not vest in the creditor, it so far becomes his, if the tender is kept good and is brought into court, that he cannot recover any interest, costs or damages if the tender is for the proper amount, and all the requirements of the law were observed in making it,—hence the debtor, by using the money, virtually withdraws the tender and makes it his own. It may be that the precise pieces of money need not be kept separate, but the amount must be kept at all times subject to be received by the debtor when he calls for it. These rules were not observed in this case, and the tender was not sufficient to arrest the accruing of interest"—because as the case shows the debtor had not the money in readiness when the creditor demanded it; he had used it in his business and

⁵⁴ *Becker v. Boon*, 61 N. Y. 317; *Croninger v. Crocker*, 62 Id. 151; *Hamlett v. Tallman*, 30 Ark. 505; *Gilkeson v. Smith*, 15 W. Va. 44; *Allen v. Cheever*, 61 N. H. 32; *Gilpatrick v. Ricker*, 82 Me. 185; *Wheeler v. Woodward*, 66 Pa. St. 158; *Sidenberg v. Ely*, 90 N. Y. 257; 43 Am. Rep. 163.

iff, whatsoever the result.⁵⁵ So where the contract was to accept payment for the goods by the note of a third person, and the note is tendered and refused, the note is afterward held by the debtor as bailee for the creditor, and the latter may maintain an action on it.^{55a} The tender may effectually be first made after suit by pleading and payment into court.⁵⁶

had no other on hand. In *Park v. Wiley*, 67 Ala. 312, the court say: "Where a tender is relied upon, the duty resting on the party making it is to keep the money safely, not the *identical* coin or bank notes, but money of like kind, so that he may produce it when required." In this case "a part of the money had been borrowed, and it was immediately returned to the tender"—meaning lender—"the vendee deriving benefit from its uses." In *McCalley v. Otey*, 90 Ala. 308, the court said: "It is not meant however that the identical money tendered must be kept; it is sufficient that the party holds himself ready to pay at all times." Citing *Shields v. Lozeau*, 22 N. J. Eq. 447, where the conclusion is, "in case of tender before suit, the party makes no deposit, he keeps the money, and may use it if he will, but must hold himself in readiness to pay." Citing *Curtiss v. Greenbanks*, 24 Vt. 536, and *Woodruff v. Trapnall*, 7 English (Ark.), 640, which fully sustain the doctrine that the identical money need not be kept.

⁵⁵ *Taylor v. Brooklyn El. R. Co.*, 119 N. Y. 561.

^{55a} *Des Arts v. Leggett*, 16 N. Y. 582.

⁵⁶ *Weaver v. Nugent*, 72 Tex. 272; 13 Am. St. Rep. 792.

PART V.

BREACH OF THE CONTRACT.

SELLER'S RIGHTS AND REMEDIES.

CHAPTER I.

PERSONAL ACTION AGAINST THE BUYER.

For non-acceptance before completion.—In case of an executory agreement for sale or manufacture, if the buyer countermands his order before the time of delivery or completion, the seller may desist and immediately sue for damages.¹ And so in case of non-acceptance after completion.² These actions are maintainable even before the expiration of the term of credit.^{2a} The damages in the former case should

¹ *Hosmer v. Wilson*, 7 Mich. 294 ; 74 Am. Dec. 716 ; *Allen v. Jarvis*, 20 Conn. 38 ; *McConihe v. N. Y., etc., R. Co.*, 20 N. Y. 495 ; 75 Am. Dec. 420 ; *Atwood v. Lucas*, 53 Me. 508 ; 89 Am. Dec. 713 ; *McCormick v. Basal*, 46 Iowa, 235 ; *James v. Adams*, 16 W. Va. 267.

² *Central Lith. Co. v. Moore*, 75 Wis. 170 ; 17 Am. St. Rep. 186 ; *Moody v. Brown*, 34 Me. 107 ; 56 Am. Dec. 640, and note, 642.

^{2a} *Hamea v. Mills*, 21 Wend. 90 ; 34 Am. Dec. 216.

be compensatory ;³ in the latter generally the difference between the agreed price and the market value at the time and place appointed for delivery,⁴ the article then belonging to the seller.⁵ But if the article has no ascertainable market price, a recovery may be had for the entire contract price,⁶ or the damage may be proved in any other way.^{6a} So also where goods are made to special order or the seller has parted with the title.⁷

Action for the price may be maintained on completion and tender, although the buyer refuses to accept.⁸ But this can only be after title has passed,⁹ and after the term of credit, if any, has expired,¹⁰ unless the credit was conditional and the condition was broken.^{10a} No delivery or acceptance, however, is necessary if the goods answered the contract.¹¹

³ *Collins v. Delaporte*, 115 Mass. 162.

⁴ *Kadish v. Young*, 108 Ill. 170 ; 43 Am. Rep. 548 ; *Camden Consolidated Oil Co. v. Schlens*, 59 Md. 31 ; 43 Am. Rep. 537 ; *Dustan v. McAndrew*, 44 N. Y. 72.

⁵ *Bridgford v. Crocker*, 60 N. Y. 627.

⁶ *Gordon v. Norris*, 49 N. H. 376, and cases cited ; *Dustan v. McAndrew*, *supra*.

^{6a} *Chicago v. Greer*, 9 Wall. 726 ; *McCormick v. Hamilton*, 23 Gratt. 561.

⁷ *Pearson v. Mason*, 120 Mass. 53 ; *Shawhan v. Van Nest*, 25 Ohio St. 490 ; 18 Am. Rep. 313.

⁸ *Mason v. Decker*, 72 N. Y. 595 ; 28 Am. Rep. 190 ; *Wade v. Moffett*, 21 Ill. 110 ; 74 Am. Dec. 79 ; *Bell v. Offutt*, 10 Bush. 639 ; *Ballentine v. Robinson*, 46 Pa. St. 177.

⁹ *Ganson v. Madigan*, 15 Wis. 144 ; 82 Am. Dec. 659.

¹⁰ *Keller v. Strasburger*, 90 N. Y. 379.

^{10a} *Jaquith v. Adams*, 60 Vt. 392 (non-payment of collateral note).

¹¹ *Doremus v. Howard*, 23 N. J. L. 390 ; *Frazier v. Simmons*, 139 Mass. 531.

CHAPTER II.

REMEDIES AGAINST THE GOODS.—RESALE.

IN America it is settled, contrary to the English rule, that on default of the buyer to pay, the seller may resell and recover the difference between the contract price and the amount realized. "The vendor of personal property, in a suit against the vendee for not taking and paying for the property, has the choice ordinarily of one of three remedies: 1st, He may store and retain the property for the vendee and sue him for the entire price; 2d, He may sell the property, acting as the agent for this purpose of the vendee; and recover the difference between the contract price and the price of resale; or 3d, He may keep the property as his own and recover the difference between the market price at the time and place of delivery, and the contract price." ¹

Resale must be fairly conducted and within a reasonable time, in order to fix the measure of dam-

¹ *Dustan v. McAndrew*, 44 N. Y. 72; *Sands v. Taylor*, 5 Johns. 395; 4 Am. Dec. 374; *Holland v. Rea*, 48 Mich. 218; *Haines v. Tucker*, 50 N. H. 313; *Shawhan v. Van Nest*, 25 Ohio St. 490; 18 Am. Rep. 313; *Cook v. Brandeis*, 3 Metc. (Ky.), 557; *Bagley v. Findlay*, 82 Ill. 524; *Young v. Mertens*, 27 Md. 114; *Grist v. Williams*, 111 N. C. 53; 32 Am. St. Rep. 782; *Waples v. Over-ocker*, 75 Tex. 7; 19 Am. St. Rep. 727.

ages, but it need not be at the earliest possible moment, even in a falling market.²

Notice to the buyer of *time and place* is advisable and customary in order to show fairness, *prima facie*, although not always held necessary,³ and the same

² *Smith v. Pettee*, 70 N. Y. 13; *Brownlee v. Bolton*, 44 Mich. 218; *Rosenbaum v. Weeden*, 18 Gratt. 785; 98 Am. Dec. 737; *Saladin v. Mitchell*, 45 Ill. 79.

³ *Pollen v. LeRoy*, 30 N. Y. 549; *Lindon v. Eldred*, 49 Wis. 305. In the former case the court said: "But it is strenuously contended that it is a part of this rule that the result of such a resale can neither control the question of damages against a defaulting vendor, nor be given in evidence for such a purpose, unless the vendor gives notice to the vendee of the time and place of the proposed resale as well as of his intention to make it. There is not the slightest foundation however either in principle or authority for such an addition to the rule as I have stated it. The rule itself is founded upon good sense and justice, and was probably adopted by usage and consent before it was sanctioned by the courts, as was observed in *Sands v. Taylor*, 5 Johns. 395; 4 Am. Dec. 374. A vendor in such a case may if he choose abandon the property, treat it as the vendee's and sue the latter for the price. But it can hardly be for the interest of the latter that he should do so, and especially not in the case of perishable property, when the result might be a total loss to the vendee. He may therefore sell the property as speedily as possible, and recover the deficiency, together with his expenses, as damages. This rule is the same in all sales and in respect to property of every description. As was said by BEST, Ch. J., in *Maclean v. Dunn*, 4 Bing. 722, if articles are not perishable, price is, and he adds: 'It is a practice founded on good sense to make a resale of a disputed article, and to hold the original contractor responsible for the difference.' The difference between the agreed price of an article and its market value at the time of delivery is the actual damage sustained by a vendor upon the refusal by a vendee to accept the property sold, and the vendor may ascertain or liquidate this amount by a resale, taking all proper measures to secure as fair and favorable a sale as possible. The law regards him, it has been said in some of the cases, if in possession of

may be said, in absence of notice of time and place of sale, of the necessity of notifying the buyer of the intention to resell and hold him for the difference.⁴

The proceeds of such resale are deemed *prima facie* a fair test of the market value, and the seller may recover the difference between them and the market price,⁵ subject to the buyer's right to show that the sale was not fair or was made in circumstances calculated to prevent the obtaining of a fair price.^{5a}

The resale need not be had at the place appointed for delivery, but it should not be at a distant place, subjecting the defaulting party to expense of transportation and possibly not giving an opportunity for realizing a reasonable price.⁶ If the buyer was not notified of

the goods, as the agent *quoad hoc* of the vendee. But it is no part of such an agency, or of the duties involved in it, to notify the principal of the time and place at which the goods are to be sold or exposed for sale. Indeed in a majority of cases, such a notice would be entirely impracticable, as it would have been in this. Unless the sale is to be public and at auction, no notice of the time and place can be given. But in very many cases, sales by auction are not the usual, nor are they a favorable mode of disposing of merchandise."

⁴ Gaskell v. Morris, 7 W. & S. 32; Holland v. Rea, 48 Mich. 218; Atwood v. Lucas, 53 Me. 508; Bagley v. Findlay, 82 Ill. 524; Rosenbaum v. Weeden, 18 Gratt. 785; Redmond v. Smock, 28 Ind. 365; McClure v. Williams, 5 Sneed, 718; West v. Cunningham, 9 Port. 104; 33 Am. Dec. 300. In the last case the court say, the contract being at an end in consequence of the buyer's default, he has no right to insist upon notice.

⁵ Cases under 1; Whitney v. Boardman, 118 Mass. 242; Bell v. Offutt, 10 Bush, 632, and cases cited above.

^{5a} West v. Cunningham. *supra*.

⁶ Chapman v. Ingram, 30 Wis. 290; Rickey v. Tenbroeck, 63 Mo. 563.

the time and place of sale, he may be allowed to show that the sale was not fair or that the goods did not bring their fair market value.⁷

⁷ Cases under 6 ; *Girard v. Taggart*, 5 S. & R. 19 ; 9 Am. Dec. 327 ; *Haskell v. McHenry*, 4 Cal. 411.

CHAPTER III.

REMEDIES AGAINST THE GOODS.—LIEN.

“A LIEN in general may be defined to be a right of retaining property until a debt due to the person retaining it has been satisfied; and as the rule of law is that in a sale of goods, where nothing is specified as to delivery or payment, the vendor has the right to retain the goods until payment of the price, he has in all cases *at least* a lien, unless he has waived it.”¹ The right to a lien implies that the title has passed, because no one can have a right of lien on his own goods.

Where there is no agreement to the contrary the seller may retain possession of the goods until payment. This is perhaps not a very usual occurrence, but it is elementary law.² The right may subsist with the possession although the seller may have taken the buyer's note for the price, especially if the buyer has become insolvent.³

Waiver.—The lien is waived by any agreement in-

¹ Benj. on Sales, § 796.

² *Arnold v. Delano*, 4 Cush. 33; 50 Am. Dec. 754.

³ *Ibid.*; *Milliken v. Warren*, 57 Me. 46; *Clark v. Draper*, 19 N. H. 419; *White v. Welsh*, 38 Pa. St. 396; *Southwestern Ft., etc., Co. v. Stanard*, 44 Mo. 71; 100 Am. Dec. 255.

consistent with it, as by giving a receipted bill and taking a note for goods in the hands of a bailee,⁴ and ordinarily by selling on credit,⁵ even though the buyer is insolvent.⁶ But if the goods remain in the seller's hands until the term of credit runs out, the lien continues or re-attaches.⁷ So if the seller knows that the buyer has consigned the goods for advances, he loses his lien by suing the buyer.^{7a}

Delivery.—A voluntary and absolute delivery without requiring payment waives the lien, but by explicit agreement the lien may continue notwithstanding delivery.⁹ If only *part* of an entire lot of goods sold at one time are delivered, the lien for the whole price attaches not only to the remainder, but to the part delivered, because the seller's right to the entire price is conditioned on entire delivery.¹⁰ This is so even though the buyer may have sold or pledged the part delivered to him ; the seller may pursue and retake it from the second buyer or pledgee.¹¹

⁴ *Re Batchelder*, 2 Lowell, 245.

⁵ *Leonard v. Davis*, 1 Black, 476 ; *McNail v. Ziegler*, 68 Ill. 224 ; *Thompson v. Wedge*, 50 Wis. 642.

⁶ *Johnson v. Farnum*, 56 Ga. 144.

⁷ *Milliken v. Warren*, 57 Me. 46 ; *Owens v. Weedman*, 82 Ill. 409 ; *Haskell v. Rice*, 11 Gray, 240.

^{7a} *Wilmot v. Richardson*, 4 Abb. Ct. App. Dec. (N. Y.) 614.

⁸ *Freeman v. Nichols*, 116 Mass. 309 ; *Blackshear v. Burke*, 74 Ala. 239 ; *Obermier v. Core*, 25 Ark. 562 ; *Douglas v. Shumway*, 13 Gray, 498 ; *Comer v. Cunningham*, 77 N. Y. 391 ; 33 Am. Rep. 626.

⁹ *Gregory v. Morris*, 96 U. S. 619.

¹⁰ *Buckley v. Furniss*, 17 Wend. 504 ; *New Haven, etc., Co. v. Campbell*, 128 Mass. 104 ; 35 Am. Rep. 360 ; *Morris v. Rexford*, 18 N. Y. 555.

¹¹ *Palmer v. Hand*, 13 Johns. 434 ; 7 Am. Dec. 392.

Delivery Orders.—If the buyer fails after the seller has given a delivery order on a warehouseman for the goods, the seller may rescind the order and revoke the authority to deliver; ¹² even as against a *bona fide* second purchaser,¹³ unless the latter bought on the faith of the order and a bill of sale, and the order has been accepted and recognized by the bailee, as by marking the goods with the sub-purchaser's name.¹⁴

¹² *Anderson v. Reed*, 106 N. Y. 333.

¹³ *Keeler v. Goodwin*, 111 Mass. 490.

¹⁴ *Hollingsworth v. Napier*, 3 Caines, 182; 2 Am. Dec. 268.

CHAPTER IV.

REMEDIES AGAINST THE GOODS.—STOPPAGE IN TRANSIT.*

STOPPAGE in transit is an extension of the right of lien. It exists where the parties live at a distance from each other, the goods are in course of transportation for delivery, have not been paid for, and the buyer is insolvent. In such circumstances, the seller may retake the goods at any time before they come to the possession of the buyer.¹ The right, like that of lien, presupposes the vesting of title, but it may be exercised before the expiration of a term of credit or the maturity of the buyer's note.^{1a} The right is not impaired by part payment,² or part delivery.³

Who may exercise the right.—Not only a seller, but a factor or agent who buys in his own name or on

* I see no sense in preserving the Latin form "*in transitu.*"

¹ *Farrell v. Richmond, etc., R. Co.*, 102 N. C. 390; 11 Am. St. Rep. 760.

^{1a} *Stubbs v. Lund*, 7 Mass. 453; 5 Am. Dec. 63; *Bell v. Moss*, 5 Whart. 189; *Newhall v. Vargas*, 13 Me. 93; 29 Am. Dec. 489; *Atkins v. Colby*, 20 N. H. 154; *Clapp v. Sohmer*, 55 Iowa, 273. Otherwise of course where a note of a third person has been taken in *payment*, *Eaton v. Cook*, 32 Vt. 58.

² *Newhall v. Vargas, supra.*

³ *Buckley v. Furniss*, 17 Wend. 504.

his own credit, and ships to his principal,⁴ or any one who has paid the price for the buyer and taken an assignment of a bill of lading as security.⁵

Against whom it may be exercised.—The right may be exercised only against an insolvent buyer.⁶ The *fact* of the insolvency is sufficient, without any *act* of insolvency,⁷ and the *fact* alone is considered, irrespective of the acts of third persons, as attaching creditors.⁸ If the insolvency existed at the time of the sale, and the seller was then ignorant of it, he may, after discovery of it, stop the goods before the transit is completed, but not if he knew of it at the time of the sale.⁹

When does the transit begin?—When the right of lien is lost.¹⁰

⁴ *Newhall v. Vargas, supra*; *Seymour v. Newton*, 105 Mass. 275.

⁵ *Muller v. Pondir*, 55 N. Y. 325; 14 Am. Rep. 259.

⁶ *Naylor v. Dennie*, 8 Pick. 198; 19 Am. Dec. 319.

⁷ *Gustine v. Phillips*, 38 Mich. 674.

⁸ *Ibid.*; *Benedict v. Schættle*, 12 Ohio St. 515; *Loeb v. Peters*, 63 Ala. 243; 35 Am. Rep. 17; *Reynolds v. Boston & Me. R. Co.*, 43 N. H. 589; *Blum v. Marks*, 21 La. Ann. 268; 99 Am. Dec. 725; *O'Brien v. Norris*, 16 Md. 122; 77 Am. Dec. 284; *White v. Mitchell*, 38 Mich. 390; *Bender v. Bowman*, 2 Pearson, 517; *Farrell v. Richmond, etc., R. Co.*, 102 N. C. 390; 11 Am. St. Rep. 760; 3 Lawy. Rep. Ann. 647; *Kingman v. Denison*, 84 Mich. 608; 22 Am. St. Rep. 711; *More v. Lott*, 13 Nev. 380. *Rogers v. Thomas*, 20 Conn. 54, holds that the insolvency must be subsequent to the sale.

⁹ *Buckley v. Furniss*, 17 Wend. 504; *O'Brien v. Norris*, 16 Md. 122; 77 Am. Dec. 284; *Fenkhausen v. Fellows*, 20 Nev. 312; 4 Lawy. Rep. Ann. 732.

¹⁰ *Benj. Sales*, § 839.

What does or does not defeat the right, immediately.—1. *Attachment or resale.*—Levy by attachment or execution by a creditor of the buyer pending transit does not defeat the right. Indeed the right is designed to protect the seller against this very thing.¹¹ Mere sale by the buyer to a third, without consent of the original seller or delivery, does not defeat the right,¹² but otherwise if the goods are delivered,¹³ or shipped at the time of sale by the buyer's order to a third person as consignee for him, or as purchaser from him.¹⁴ Shipment on a vessel for the purchaser's residence, under a bill of lading making the goods deliverable to him or his assignees, does not defeat the right.¹⁵

2. *Transfer by bill of lading.*—The right is defeated by a *bona fide* sale, for value, with an assignment and delivery of the bill of lading, even if the transfer of the bill of lading was made after notice to the carrier to stop the goods¹⁶ and though the sale was

¹¹ *Naylor v. Dennie*, 8 Pick. 198; 19 Am. Dec. 319; *Cox v. Burns*, 1 Iowa, 64; *Sherman v. Rugee*, 55 Wis. 346; *Buckley v. Furniss*, 17 Wend. 504; *Blackman v. Pierce*, 23 Cal. 508; *Wood v. Yeatman*, 15 B. Mon. 270; *Rucker v. Donovan*, 13 Kans. 251; 19 Am. Rep. 84; *Miss. Mills v. Bank*, 9 Lea, 314.

¹² *Holbrook v. Vose*, 6 Bosw. 77.

¹³ *U. S. Wind Engine Co. v. Oliver*, 16 Neb. 612.

¹⁴ *Treadwell v. Aydlett*, 9 Heisk. 388; *Rowley v. Bigelow*, 12 Pick. 307; 23 Am. Dec. 607.

¹⁵ *Stubbs v. Lund*, 7 Mass. 453; 5 Am. Dec. 63. *Bolin v. Huffnagle*, 1 Rawle, 9, and *Pequeno v. Taylor*, 38 Barb. 375, to the contrary, are disapproved by Mr. Bennett (*Benj. Sales*, 6th Am. ed., notes, p. 858.)

¹⁶ *Newhall v. Cent. Pac. R. Co.*, 51 Cal. 345; 21 Am. Rep.

to *pay* an antecedent debt,¹⁷ but not where the assignment was merely as collateral security, with nothing advanced or surrendered.¹⁸ If the original sale was fraudulent on the part of the buyer, the right is not discharged by his transfer by bill of lading before the goods actually reach him.¹⁹ The right subsists as against all assignees for the benefit of creditors of the buyer.²⁰

3. If the goods come to the hands of the purchaser, although short of the original destination, the right ceases. The buyer may intercept them on the way,²¹ if done in good faith.²² If his agent intercepts them, but merely for the purpose of promoting the transmission as originally designed, the right is not lost,²³ but if the interference is designed to change the original destination, it is such an act of ownership as destroys the seller's right of stoppage.²⁴

713. But nothing short of the assignment and delivery will avail. *Ocean Steamship Co. v. Ehrlich*, 88 Ga. 502.

¹⁷ *Lee v. Kimball*, 45 Me. 172; *Clementson v. Grand T. Ry. Co.*, 42 Up. Can., Q. B. 273.

¹⁸ *Loeb v. Peters*, 63 Ala. 243; 35 Am. Dec. 17. But see *Mo. Pac. R. Co. v. Heidenheimer*, 82 Tex. 195.

¹⁹ *Dows v. Perrin*, 16 N. Y. 325; *Decan v. Shipper*, 35 Pa. St. 239; 78 Am. Dec. 334; *Pollard v. Vinton*, 105 U. S. 7.

²⁰ *Stanton v. Eager*, 16 Pick. 467; *Buckley v. Furniss*, 17 Wend. 504; *Bell v. Moss*, 5 Whart. 189.

²¹ *Secomb v. Nutt*, 14 B. Mon. 324; *Mohr v. Boston, etc., Railroad*, 106 Mass. 67; *Stevens v. Wheeler*, 27 Barb. 658.

²² *Poole v. Houston, etc., R. Co.*, 58 Tex. 134.

²³ *Harris v. Pratt*, 17 N. Y. 249; *Cabeen v. Campbell*, 30 Pa. St. 254; *Aguirre v. Parmelee*, 22 Conn. 473; *Blackman v. Pierce*, 23 Cal. 508; *Mohr v. Boston & Albany R. Co.*, 106 Mass. 67.

²⁴ See cases. 23; *Becker v. Hallgarten*, 86 N. Y. 167.

When does the right naturally end?—Of course, when the goods are delivered on the buyer's premises in his control.^{24a} So also when they have reached the original destination, and the carrier's duty and liability are terminated, although not actually in the buyer's manual possession,^{24b} and although they there may be immediately forwarded by him to a new destination,²⁵ or left in care of the carrier's agent awaiting directions to that end.^{25a} So if the goods are merely temporarily stored midway, awaiting transportation to the original point, the right is not lost.²⁶ And if they are still in the hands of the carrier, as carrier, although at the point of destination, the right is not terminated;²⁶ even if in the hands of a local carrier at the place of destination.²⁸ Even where the buyer demanded them, but the carrier refused delivery unless he was paid for former freights, and carried them back;²⁹ and so where they were attached by a

^{24a} *Diehl v. McCormick*, 143 Pa. St. 584.

^{24b} *Sawyer v. Joslyn*, 20 Vt. 172; 49 Am. Dec. 768; *Brooke Iron Co. v. O'Brien*, 135 Mass. 442.

²⁵ *Biggs v. Barry*, 2 Curtis, 259; *Pottinger v. Hecksher*, 2 Grant, 309; *Brooke Iron Co. v. O'Brien*, 135 Mass. 442.

^{25a} *Sangslaff v. Stix*, 64 Miss. 171; 60 Am. Rep. 49; and note, 51.

²⁶ *Covell v. Hitchcock*, 23 Wend. 611. But see *Guilford v. Smith*, 30 Vt. 49.

²⁷ *Inslee v. Lane*, 57 N. H. 454; 60 Am. Rep. 51, note; *Seymour v. Newton*, 105 Mass. 275; *Parker v. McIver*, 1 Des. Eq. 281; 1 Am. Dec. 656; *Greve v. Dunham*, 60 Iowa, 108; *Naylor v. Dennie*, 8 Pick. 198; 19 Am. Dec. 319; *Mottram v. Heyer*, 5 Denio, 629.

²⁸ *White v. Mitchell*, 38 Mich. 390.

²⁹ *Allen v. Mercier*, 1 Ashm. 103.

creditor of the buyer before removal from the cars at the destination, and taken into possession by the officer,³⁰ or demanded of the carrier by the buyer's assignee in insolvency,^{30a} or even where they had gone into the hands of a messenger in insolvency awaiting the appointment of an assignee, the buyer having declined to take them,^{30b} or into the hands of a mortgagee of the buyer under a mortgage made prior to the purchase.^{30c} So the right is not terminated if the carrier, at the destination, retains the goods for freight, or puts them into a public warehouse awaiting payment of freight and charges, his lien still subsisting.³¹

But if the goods at the destination have been put into the hands of any agent for the buyer, this ends the right to stop, although they may not have come to the buyer's manual possession. The agent of the carrier may for this purpose become the agent of the seller, when the carrier's lien is ended and the agent merely retains possession for and awaiting the instructions of the buyer.³²

³⁰ *Kitchen v. Spear*, 30 Vt. 545.

^{30a} *Anderson v. Fish*, 16 Ont. 476 ; 17 Id. 28.

^{30b} *Tufts v. Sylvester*, 79 Me. 213 ; 1 Am. St. Rep. 303.

^{30c} *Kingman v. Denison*, 84 Mich. 608 ; 22 Am. St. Rep. 711.

³¹ *McLean v. Breithaupt*, 12 Ont. App. 383 ; *Calahan v. Babcock*, 21 Ohio St. 281 ; *Clapp v. Peck*, 55 Iowa, 270 ; *Symms v. Schotten*, 35 Kans. 310 ; *Halff v. Allyn*, 60 Tex. 278 ; *Chandler v. Fulton*, 10 Tex. 2 ; 60 Am. Dec. 188 ; *More v. Lott*, 13 Nev. 384 ; *Morris v. Shryock*, 50 Miss. 591 ; *Hoover v. Tibbits*, 13 Wis. 79 ; 8 Am. Rep. 63.

³² *Sangslaff v. Stix*, 64 Miss. 171 ; 60 Am. Rep. 49 ; *McFetridge v. Piper*, 40 Iowa, 627 ; *Hall v. Dimond*, 63 N. H. 565 ; *Lane v. Robinson*, 18 B. Mon. 623.

The right is not terminated by deposit in the custom-house pending entry and payment of dues or the giving of a bond.³³ But otherwise after entry and after the buyer is entitled to remove them.³⁴

Manner of the exercise of the right.—A claim on or notice to or demand of any one in possession is sufficient without any physical demonstration,³⁵ but it must be of some one in possession, custody or charge. If the buyer gets possession afterward, it is somewhat uncertain whether he can hold against the seller.³⁶ The act may be done by the seller's authorized agent,³⁷ or if done by an unauthorized agent it may be effectually ratified by the seller before but not after demand by the buyer.³⁸

Effect of the exercise of the right.—This is only to extend the right of lien, and does not rescind the sale and revest the title in the seller.^{38a} He simply holds the goods as security for the purchase-money. The seller may afterwards recover the price by resale or

³³ *Mottram v. Heyer*, 5 Denio, 629; *Lewis v. Mason*, 36 Up. Can. Q. B. 590; *Donath v. Broomhead*, 7 Pa. St. 301.

³⁴ *Cartwright v. Wilmerding*, 24 N. Y. 521; *Wiley v. Smith*, 1 Ont. App. 179; 2 Duval, 1.

³⁵ *Reynolds v. Boston & Me. R. Co.*, 43 N. H. 580; *Newhall v. Vargas*, 13 Me. 93; 29 Am. Dec. 489; *Rucker v. Donovan*, 13 Kans. 251; 19 Am. Rep. 84; *Allen v. Me. Cent. R. Co.*, 79 Me. 327; 1 Am. St. Rep. 310.

³⁶ *Mottram v. Heyer*, 5 Denio, 629, *pro*; *Bell v. Moss*, 5 Whart. 206, *con*.

³⁷ *Reynolds v. Boston & Me. R. Co.*, 43 N. H. 580.

³⁸ *Durgy, etc., Co. v. O'Brien*, 123 Mass. 14; *Davis v. McWhirter*, 40 Up. Can. Q. B. 598.

^{38a} *Cross v. O'Donnell*, 44 N. Y. 661; 4 Am. Rep. 721.

by action, and if the price is tendered subsequently to the stoppage he must give up the goods unless resold.³⁹ But he may resell and give title.⁴⁰ The stoppage is valid against an innocent second buyer before arrival and delivery of the goods.⁴¹ The right is paramount even to the lien of the carrier.⁴² The seller is not bound to hold the goods until the expiration of the term of credit.⁴³

³⁹ *Stanton v. Eager*, 16 Pick. 475 ; *Rogers v. Thomas*, 20 Conn. 53 ; *Babcock v. Bonnell*, 80 N. Y. 244 ; *Penn. R. Co. v. Am. Oil Works*, 126 Pa. St. 485 ; 12 Am. St. Rep. 885 ; *Chandler v. Fulton*, 10 Tex. 2 ; 60 Am. Dec. 188 ; *Rucker v. Donovan*, 13 Kans. 251 ; 19 Am. Rep. 84 ; *Newhall v. Vargas*, 13 Me. 93 ; 15 Id. 314.

⁴⁰ *Tuthill v. Skidmore*, 124 N. Y. 148.

⁴¹ *Pattison v. Culton*, 33 Ind. 240 ; 5 Am. Rep. 199.

⁴² *Farrell v. Richmond, etc.*, R. Co., 102 N. C. 390 ; 11 Am. St. Rep. 760.

⁴³ *Diem v. Koblitz*, 49 Ohio St. 41.

CHAPTER V.

REMEDIES OF THE BUYER.

Action for non-delivery.—If the seller wrongfully refuses or neglects to deliver, when delivery is due, the buyer may maintain an action of damages against him.¹ If the sale was for cash, the price must first be tendered in order to put the seller in default.²

Measure of damages.—If the goods are not paid for, the measure of damages is the difference between the contract price and the fair market value at the agreed time and place of delivery, with interest.³ If no time and place were fixed, the place of sale, and the time of sale, or a reasonable time thereafter will govern,⁴ or the time of demand and refusal.⁵ This rule, of course, is varied in the cases where the seller knew the designed and special use of the goods.⁶ In the absence of any market price or value at the agreed place of delivery, that value at the nearest market

¹ Benj. Sales, § 869, etc.

² Nelson v. Plimpton, etc., Co., 55 N. Y. 480.

³ Benj. Sales, § 870 ; Kadish v. Young, 108 Ill. 170 ; 48 Am. Rep. 548.

⁴ Thompson v. Woodruff, 7 Coldw. 401.

⁵ Williams v. Woods, 16 Md. 220.

⁶ See cases *ante*, p. 145, ref. 51; Bartlett v. Blanchard, 13 Gray,

where the goods were procurable, with the expense of transportation to the agreed place, would be the measure,⁷ subject to the duty of the buyer to render the damage as light as possible by reasonable efforts to supply himself with the goods elsewhere.⁸ If the goods are not procurable anywhere, at any price, the buyer may prove his damages in any other way.⁹ If the value has continued stationary in the market, nominal damages are recoverable.¹⁰ If *the price has been paid in advance*, two views prevail. Some courts hold the measure to be the value of the property at the agreed time and place of delivery, with interest.¹¹ This seems to be the rule in Alabama, Pennsylvania, Maine and Vermont. Other courts, as California, Connecticut, Iowa, Indiana (as to stocks), New York, Pennsylvania (as to stocks alone), South Carolina and Texas, award the highest market value between the breach and the commencement of the

429 ; Buffalo, etc., Co. v. Phillips, 64 Wis. 338 ; Adams Ex. Co. v. Egbert, 36 Pa. St. 360 ; 78 Am. Dec. 382.

⁷ Grand Tower Co. v. Phillips, 23 Wall. 471 ; Durst v. Burton, 47 N. Y. 167 ; 7 Am. Rep. 428 ; Douglas v. Merceles, 25 N. J. Eq. 144 ; Furlong v. Polleys, 30 Me. 491 ; 50 Am. Dec. 635 ; McCormick v. Hamilton, 23 Gratt. 561 ; Coxe v. England, 65 Pa. St. 212 ; Sellar v. Clelland, 2 Colo. 532.

⁸ Hamilton v. McPherson, 28 N. Y. 72 ; 84 Am. Dec. 330 ; Humphreysville Copper Co. v. Vt. Copper Mining Co., 33 Vt. 92.

⁹ Culin v. Woodbury Glass Works, 108 Pa. St. 220 ; Cockburn v. Ashland Lumber Co., 54 Wis. 619.

¹⁰ Bush v. Canfield, 2 Conn. 485. And on this point of damages see classified list of cases by Mr. Bennett (Benj. Sales, 6th Am. ed. p. 900).

¹¹ Shepherd v. Hampton, 3 Wheat. 200 ; 1 Sedg. Dam. p. [274].

suit, or sometimes the time of the trial.¹² As to *special or consequential damages*, consult cases below.¹³

Specific performance.—Only in cases where the remedy at law is inadequate, can a bill in equity or an equitable action be maintained,¹⁴ as for example, on a sale of slaves,¹⁵ patent rights,¹⁶ heirlooms,¹⁷ sometimes stocks,¹⁸ (but not when the object is to get control of the corporation)¹⁹ or specific articles obtainable only from the seller.²⁰

¹² *Suydam v. Jenkins*, 3 Sandf. 614 ; *Clark v. Pinney*, 7 Cow. 687 ; and classified list of cases cited by Mr. Bennett (*Benj. Sales*, 6th Am. ed. p. 601-2).

¹³ *Wakeman v. Wheeler & W. M. Co.*, 101 N. Y. 205 ; 54 Am. Rep. 676 ; *Hammer v. Schoenfelder*, 47 Wis. 455 (loss of meat sustained by want of ice) ; *Griffin v. Colver*, 16 N. Y. 489 ; 69 Am. Dec. 718 ; *Stewart v. Power*, 12 Kans. 596 ; *Benton v. Fay*, 64 Ill. 417.

¹⁴ 3 Pom. Eq. Jur. § 1402, note.

¹⁵ *Sartor v. Gordon*, 2 Hill (S. C.) 121.

¹⁶ *Somerby v. Buntin*, 118 Mass. 279 ; 19 Am. Rep. 459.

¹⁷ *Williams v. Howard*, 3 Murphey, 74.

¹⁸ *Todd v. Taft*, 7 Allen, 371 ; *Cushman v. Thayer Manuf. Jewelry Co.*, 76 N. Y. 365 ; 32 Am. Rep. 315. In the latter case the court observe : " It is easy to see that the party may have become the owner or purchaser of stock in a corporation, which he desires to hold as a permanent investment, which may be at the time of but little value, in fact without any market value whatever, and its real worth may consist in the prospective rise which the owner has reason to anticipate will follow from facts within his knowledge. To say that the holder shall not be entitled to the stock, because the corporation, without any just reason, refuses to transfer it, and that he shall be left to pursue the remedy of an action for damages, in which he can recover only a nominal amount, would establish a rule which must work great injustice in many cases, and confer a power on corporate bodies which has no sanction in the law." ' .

¹⁹ *Foll's Appeal*, 91 Pa. St. 434 ; 36 Am. Rep. 671.

²⁰ *Eq. Gas Light Co. v. Balt. Coal Tar Co.*, 63 Md. 285.

Right to return.—The buyer may return the goods, (1) where they do not answer the conditions of the contract, if this is done in a reasonable time and the seller is placed *in statu quo*.²¹ This right may be exercised for defect in agreed quality of non-existing or unascertained articles, but not in case of an existing, known and identified article.²² (2) On sale by sample, when the goods do not correspond with the sample.²³ (3) For breach of an express warranty. The rules on this point are conflicting. The return is allowed in Maryland, Massachusetts, Maine, Iowa, Wisconsin, and Illinois.²⁴ But the contrary rule prevails in New York, Kentucky, Pennsylvania, Tennessee, Vermont, Indiana and Texas.²⁵ (4) In cases of fraud,²⁶ the

²¹ *Hoadley v. House*, 32 Vt. 179 ; 76 Am. Dec. 167.

²² *Pope v. Allis*, 115 U. S. 363.

²³ *Butler v. Northumberland*, 50 N. H. 33 ; *Magee v. Billingsley*, 3 Ala. 679.

²⁴ *Rutter v. Blake*, 2 H. & J. 353 ; 3 Am. Dec. 550 ; *Bryant v. Isburgh*, 13 Gray, 607 ; *Marston v. Knight*, 29 Me. 341 ; *Rogers v. Hanson*, 35 Iowa, 287 ; *Boothby v. Scales*, 27 Wis. 636 ; *Sparling v. Marks*, 86 Ill. 125.

²⁵ *Muller v. Eno*, 14 N. Y. 597 ; *Lightburn v. Cooper*, 1 Dana, 273 ; *Allen v. Anderson*, 3 Humph. 581 ; *Freyman v. Knecht*, 78 Pa. St. 141 ; *Matteson v. Holt*, 45 Vt. 336 ; *Marsh v. Low*, 55 Ind. 271 ; *Wright v. Davenport*, 44 Tex. 164. Also *Thornton v. Wynn*, 12 Wheat. 189. Some of the cases only go to the extent of holding that the buyer is not *bound* to return the property. This seems to be the later New York rule. See the cases discussed in *Day v. Pool*, 52 N. Y. 416 ; 11 Am. Rep. 719, where it is said: "it seems to be regarded as settled in this State, though perhaps not necessarily determined in any case, that he has no right to return the goods in such case, unless there was fraud in the sale." See to this effect, *Voorhees v. Earl*, 2 Hill, 288 ; *Cary v. Gruman*, 4 Id. 625. "In Massachusetts and in

²⁶ Cases *supra* : *Voorhees v. Earl*, 2 Hill, 288.

right must be exercised within a reasonable time after arrival or discovery.²⁷

Action on warranty.—The buyer may sustain an action for breach of warranty, keeping the goods, although the seller had expressly agreed that he would take them back if they failed to answer the warranty.²⁸ But probably not so if the buyer expressly agreed that the article “shall be returned” if defective.²⁹ If the buyer returns the article, he may maintain an action for actual damage accruing before the return.³⁰ But if one buys machinery, with a warranty, but receives and puts it in operation knowing that it is defective, he cannot recover damages for the breach during the time of such use.³¹ The buyer may recover on the warranty, without returning the goods, or offering them, or giving notice. This is the general American doctrine, laid down in a great number of cases,³² in the absence of proof of final acceptance of

Maryland the vendor has his option to retain and use the property and recoup, or sue on his warranty.” Citing cases under reference 24.

²⁷ Cases *supra*.

²⁸ *Douglass Axe Co. v. Gardner*, 10 Cush. 88 ; *Perrine v. Serrell*, 30 N. J. L. 454 ; *McCormick v. Dunville*, 36 Iowa, 645 ; *Mandel v. Buttles*, 21 Minn. 391. This is contrary to *Adam v. Richards*, 2 H. Bl. 573.

²⁹ *Bomberger v. Griener*, 18 Iowa, 477 ; *Hinchcliffe v. Barwick*, 5 Ex. Div. 177.

³⁰ *Kimball v. Vroman*, 35 Mich. 310 ; *Clarke v. McGetchie*, 49 Iowa, 437 ; *Northwood v. Rennie*, 3 Ont. App. 37.

³¹ *Nye v. Iowa City Alcohol Works*, 51 Iowa, 129 ; 33 Am. Rep. 121.

³² *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260 ; 16 Am. St. Rep. 753 ; *Brigg v. Hilton*, 99 N. Y. 517 ; 52 Am. Rep. 63 ;

the goods by the buyer's use of them after knowledge of the defect.³³

The action does not lie until title has passed, nor if the buyer has refused to take the article on account of the breach,³⁴ but it is no obstacle that the goods are not paid for,³⁵ or have been sold again by the buyer without any claim being set up against him on account of the defect,³⁶ or sold at a higher price,^{36a} or that the buyer gave his note for the price after discovery of the breach,³⁷ or suffered judgment against himself without setting up the breach in defence.³⁸ If however he got a deduction of any amount from the price on account of the breach, that defeats his action.³⁹ An

Vincent v. Leland, 100 Mass. 432; *Lane v. Lantz*, 27 Md. 211; *Freyman v. Knecht*, 78 Pa. St. 141; *Milton v. Rowland*, 11 Ala. 732; *Bonnell v. Jacobs*, 36 Wis. 63; *Kellogg v. Denslow*, 14 Conn. 411; *Gilson v. Bingham*, 43 Vt. 410; *Lewis v. Rountree*, 79 N. C. 122; 28 Am. Rep. 309; *Underwood v. Wolf*, 131 Ill. 425; 19 Am. St. Rep. 40; *Holloway v. Jacoby*, 120 Pa. St. 583; 6 Am. St. Rep. 737; *Hillenbrand v. Stockman*, 123 Ind. 598; *Downing v. Dearborn*, 77 Me. 457. See ref. 24, 25. Mr. Bennett says, "such cases as *Reed v. Randall*, 29 N. Y. 358; *Gillespie v. Torrance*, 25 N. Y. 306; *Rust v. Eckler*, 41 N. Y. 488, must be taken with some degree of allowance." It is difficult to see why, for in the first there was no warranty; in the second the question was one of setting up the breach in an action against an accommodation indorser on a note for the price; and the third precisely holds the general doctrine of the cases cited above.

³³ *Frye v. Milligan*, 10 Ont. Rep. 509.

³⁴ *Taylor v. Saxe*, 57 Hun, 411.

³⁵ *Aultman v. Wheeler*, 49 Iowa, 647; *Thoreson v. Minneapolis H. Works*, 29 Minn. 341; *Creighton v. Comstock*, 27 Ohio St. 548.

³⁶ *Muller v. Eno*, 14 N. Y. 598.

^{36a} *Brown v. Bigelow*, 10 Allen, 242.

³⁷ *Wheelock v. Berkley*, 38 Ill. App. 518.

³⁸ *Bodurtha v. Phelon*, 13 Gray, 413.

³⁹ *Batterman v. Pierce*, 3 Hill, 171.

action for breach of implied warranty of title is not premature when the property has been taken by a third person in a pending action to enforce a chattel mortgage outstanding at the time of the sale.^{39a}

Measure of damages.—The general rule is that the buyer may recover the difference between the value of the article contracted for and that furnished, (not the price actually paid.⁴⁰) Benjamin says (Sales, § 882): “With regard to special damages it has been laid down in the leading case of *Griffin v. Colver*, 16 N. Y. 489, that ‘the broad general rule in such cases is that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained,’ and this rule is subject to but two conditions:—1. The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation; and 2. They must be certain, both in their nature and in respect to the cause from which they proceed. ‘The familiar rules on the subject are all subordinate to these. For instance, that the damages must flow directly and naturally from the breach of contract, is a mere mode of expressing the first; and that they must be, not the remote, but the proximate consequences of such breach, and must not be

^{39a} *Hodger v. Wilkinson*, N. C. ; 17 Lawy. Ann. Rep. 545.

⁴⁰ *Benj. Sales*, p. 906 (6th Am. ed.); *Parks v. Morris Ax & Tool Co.*, 54 N. Y. 586.

speculative or contingent, are different modifications of the last.' The rules laid down in this case have always been referred to with approval, and have been recently reaffirmed by the same court." Citing *Messmore v. N. Y. Shot and Lead Co.*, 40 N. Y. 427; *Cassidy v. Le Fevre*, 45 N. Y. 567; *Booth v. Spuyten D. M. Co.*, 60 N. Y. 487; *Devlin v. Mayor, etc.*, 63 N. Y. 25; *U. S. v. Behan*, 110 U. S. 344.

In regard to special or consequential damages, it has been held, for example, that the manufacturer of carriage-springs was liable for the expense of taking them out and supplying them with others,⁴¹ and so where a steam boiler in a mill was warranted, the buyer was allowed to recover the rent while the mill was idle on account of an explosion.⁴² On breach of warranty of quality of an article for a special use, the manner of damages has been held to be the profit which the use would have covered if the article had been as warranted.⁴³ This was a case of a refrigerator expressly warranted to keep chickens sound until the next spring; on its failure, the buyer was allowed to recover as damages the profits which he would have made from the chickens if the refrigerator had pre-

⁴¹ *Thoms v. Dingley*, 70 Mo. 100; 35 Am. Rep. 310. See *Cassidy v. Le Fevre*, 45 N. Y. 563 (engine and boilers); *Parks v. Morris Ax & Tool Co.*, 54 Id. 586 (steel).

⁴² *Sinker v. Kidder*, 123 Ind. 530.

⁴³ *Beeman v. Banta*, 118 N. Y. 538; 16 Am. St. Rep. 779, distinguishing *New York S. M. Milk Pan Co. v. Remington*, 109 N. Y. 143, and citing *Reed v. McConnell*, 101 N. Y. 276; *Wakeman v. Wheeler & W. M. Co.*, 101 N. Y. 205; 54 Am. Rep. 676, and the "seed cases" in New York.

served them according to warranty. These cases are of express warranty. The same rule has been applied even as to implied warranty, where the article was sold for a special use, as in the case of seeds,⁴⁴ and of an article sold as Paris green for destroying worms,⁴⁵ and of a fertilizer.^{45a} In the last case interest was allowed on the money expended. But interest was disallowed on the amount of damages found, in one of the "seed cases."⁴⁶ In some seed cases however the possible profits have been disallowed, and the recovery has been limited to the purchase price and interest and the value of the labor in preparing the ground, less any benefit to the land thereby.⁴⁷ This latter rule seems the more just and reasonable. In the absence of an express warranty it is a very onerous and impolitic measure of damages, and one under which it would be impossible to conduct the seed business, to mulct the seller in thousands of dollars for contingent profits, without regard to weather and cultivation, on the sale of a few dollars' worth of seeds. The attempt to carry out this doctrine to its legitimate conclusions was urged to the verge of the humorous, where the argument that on breach of express warranty of a safe the

⁴⁴ "Seed cases," *post*, p. 202.

⁴⁵ *Jones v. George*, 61 Tex. 345; 48 Am. Rep. 280; practically reversing same case, 56 Tex. 149; 42 Am. Rep. 689.

^{45a} *Bell v. Reynolds*, 78 Ala. 511; 56 Am. Rep. 52.

⁴⁶ *White v. Miller*, 78 N. Y. 393; 34 Am. Rep. 544.

⁴⁷ *Ferris v. Comstock*, 33 Conn. 513; *Butler v. Moore*, 68 Ga. 780; 45 Am. Rep. 508.

seller was liable for money stolen therefrom by burglars, was disallowed.⁴⁸ It is reasonable that gains pre-

⁴⁸ *Herring v. Skaags*, 62 Ala. 180; 34 Am. Rep. 4. This very interesting question of the measure of damages in "seed" and analogous cases has been discussed much less upon principle than upon precedent in the leading American decisions. It was held, in *Kingsbury v. Taylor*, 29 Me. 508; 50 Am. Dec. 607 (A. D. 1849), that the seller of personal property, such as rye for seed, is not liable for defects of any kind in the absence of express warranty or fraud. This was founded on the early New York cases which have since been overruled there. This "has long been regarded as settled in England and in this country," say the court. Precisely the same was held, on a sale of "Wakefield cabbage seed, same as in 1881," the court curtly observing, "The vendor had just as much knowledge in regard to the kind and quality of the seed as they had." *Thisler v. Baxter*, 109 Pa. St. 443; 58 Am. Rep. 738, citing a line of Pennsylvania cases. *Hawkins v. Pemberton*, 51 N. Y. 198; 10 Am. Rep. 595, was on a sale of an article as "blue vitriol," and this was held to imply a warranty in law, or at least to make it the duty of the court to submit the question to the jury. In *Passinger v. Thorburn*, 34 N. Y. 634; 90 Am. Dec. 753, a sale of Bristol cabbage seed, the prevailing doctrine was first laid down in a seed case, but with little or no discussion on principle. The court say the plaintiff "was entitled to a full indemnity," and "the defendant must be held for the natural consequences of the contract which he did make, and the legal responsibilities following therefrom, whether he intended to be so liable or not." In *White v. Miller*, 71 N. Y. 118; 27 Am. Rep. 13, a sale of Bristol cabbage seed by the grower, the court said: "Aside from the warranty raised in this case by the description in the bill of parcels, there was, also, upon the sale in question, within the authority of *Hoe v. Sanborn*, 21 N. Y. 552, a warranty implied by law, that the seeds sold were free from any latent defect arising from the mode of cultivation. It was decided in *Hoe v. Sanborn*, that upon a sale of a chattel by a manufacturer, a warranty is implied that the article sold is free from any latent defect growing out of the process of manufacture. The rule is based on the presumed superior knowledge of the vendor; and there seems to be the same reason for implying a warranty on a sale of seeds by the grower, that they are not defective from improper cultivation, as to imply a warranty of freedom from defects in the manufacture, on a sale by a manufacturer of the article made by him. The grower of seeds must be presumed to be cognizant of any omission, or negligence in cultivation, whereby they have been deteriorated or rendered unfit for use."

vented, as well as losses actually sustained, are recoverable where the gains are certain,^{48a} but to hold a seller

“ We think the case of *Passinger v. Thorburn* should be adhered to. It was carefully considered and decided, and we are not prepared to say that the rule there adopted is a departure from correct principle. Gains prevented, as well as losses sustained, may be recovered as damages for a breach of contract, where they can be rendered reasonably certain by evidence, and have naturally resulted from the breach. *Masterton v. Mayor, etc.*, 7 Hill, 61; *Griffin v. Colver*, 16 N. Y. 489; *Messmore v. N. Y. Shot and Lead Co.*, 40 Id. 422. But mere contingent or speculative gains or losses, with respect to which no means exist of ascertaining with any certainty whether they would have resulted or not, are rejected, and the jury will not be allowed to consider them. Can it be said that the damages allowed in *Passinger v. Thorburn* are incapable of being ascertained with reasonable certainty by a jury ?

“ The character of the season, whether favorable or unfavorable for production; the manner in which the plants set were cultivated; the condition of the ground; the results observed in the same vicinity where cabbages were planted under similar circumstances; the market value of Bristol cabbages when the crop matured; the value of the crop raised from the defective seed; these and other circumstances may be shown to aid the jury, and from which they can ascertain approximately the extent of the damages resulting from the loss of a crop of a particular kind.”

In *Wolcott v. Mount*, 36 N. J. L. 262; 13 Am. Rep. 438, a case of sale of “ early strap-leaved red-topped, turnip seed,” by seed merchants, the court said : “ It must not be supposed that under the principle of *Hadley v. Baxendale*, 9 Ex. ch. 341, mere speculative profits, such as might be conjectured to have been the probable results of an adventure which was defeated by the breach of the contract sued on, the gains from which are entirely conjectural, with respect to which no means exist in ascertaining, even approximately, the probable results, can, under any circumstances, be brought within the range of damages recoverable. The cardinal principle in relation to the damages to be compensated for on the breach of a contract, that the plaintiff must establish the quantum of his loss, by evidence from which the jury will be able to estimate the extent of his injury, will exclude all such elements of injury as are incapable of being ascertained by the usual rules of evidence to a reasonable degree of certainty.

^{48a} *Messmore v. N. Y. Shot, etc., Co.*, 40 N. Y. 422.

on an implied warranty as against wind and frost and bugs and worms, seems to the writer very near the

“For instance, profits expected to be made from a whaling voyage, the gains from which depend in a great measure on chance, are too purely conjectural to be capable of entering into compensation for the non-performance of a contract, by reason of which the adventure was defeated. For a similar reason, the loss of the value of a crop for which the seed had not been sown, the yield from which, if planted, would depend upon the contingencies of weather and season, would be excluded as incapable of estimation, with that degree of certainty which the law exacts in proof of damages. But if the vessel is under charter, or engaged in a trade, the earnings of which can be ascertained by reference to the usual schedule of freights in the market, or if a crop has been sown on the ground prepared for cultivation, and the plaintiff's complaint is, that because of the inferior quality of the seed a crop of less value is produced, by these circumstances the means would be furnished to enable the jury to make a proper estimation of the injury resulting from the loss of profits of this character.

“In this case the defendants had express notice of the intended use of the seed. Indeed, the fact of the sale of seeds by a dealer keeping them for sale for gardening purposes, to a purchaser engaged in that business, would of itself imply knowledge of the use which was intended, sufficient to amount to notice. The ground was prepared and sowed, and a crop produced. The uncertainty of the quantity of the crop, dependent upon the condition of weather and season, was removed by the yield of the ground under the precise circumstances to which the seed ordered would have been exposed. The difference between the market value of the crop raised, and the same crop from the seed ordered, would be the correct criterion of the extent of the loss.”

In *Butler v. Moore*, 68 Ga. 780; 45 Am. Rep. 508, a case of express warranty of German millet-seed to be good and to germinate and grow, the court said : “In this suit no fraud was alleged nor any knowledge on the part of the seller that the seeds were bad. It is merely a suit on the warranty of the merchantable quality of the goods, which the law imposes, or on the express warranty of the fitness of the seed for planting, as alleged by the plaintiff, and in such a suit we are constrained to hold, in conformity with the repeated rulings of this court, as referred to, that if the seed were worthless, the measure of damages would be the purchase-money with interest and any expenses incurred in complying with the contract after the same was entered into, such as the hauling

apex of absurdity. But where tobacco packing cases, are the subject of sale, the seller impliedly warrants

of the seed, preparing the lands for planting, sowing and rolling said seed, and such other necessary expense incurred after the entering into said contract.

“We are well aware that a different rule, as to the measure of recovery, prevails in many of the other States of the Union, as was so ably and earnestly pressed upon this court by the counsel for plaintiff in error. It was insisted that the great public policy that should control an agricultural State should not lag behind her sister States, who have recognized a more liberal rule in favor of those engaged in cultivating the soil; and that such is the policy of many of the States is made manifest in the authorities produced and relied upon by counsel for plaintiff in error. *White v. Miller*, 71 N. Y. 118; 27 Am. Rep. 13; *Wolcott v. Mount*, 36 N. J. 262; *Passinger v. Thorburn*, 34 N. Y. 634; *Railroad Co. v. Howard*, 13 How. 344; *Bank of Chenango v. Curtiss*, 19 Johns. 331; *Passinger v. Thorburn*, 35 Barb. 17; *Borradaile v. Brunton*, 8 Taunt. 535; 2 Moore, 582. It is insisted that the States announcing the rule contended for are each commercial States, with the national bias of the courts in favor of the salesman as against the farmer, and so much stronger the necessity and reason for the same to be recognized by an agricultural State like our own. This is an argument that might be well addressed to the law-making power, and not to this court, in view of the unbroken line of decisions made on this question. But while we cannot acquiesce or sanction the rule as to the full measure of damages as claimed by plaintiff in error, we think the court erred in limiting the plaintiff's recovery to the price paid for the seed with interest.”

In *Moses v. Mead*, 1 Denio, 378; 43 Am. Dec. 676, a case of sale of “mess beef” without express warranty, *BRONSON, C. J.*, said: “When there is neither fraud nor express warranty on the sale of a chattel, the buyer takes the risk of its quality and condition. No warranty of any kind can be implied from the fact that a sound price was paid *caveat emptor* and not *caveat venditor*, is the rule of the common law; and that is our law. I speak of an executed, and not of an executory contract for the sale of goods. See *Howard v. Hoey*, 23 Wend. 350; 35 Am. Dec. 572; Some of the English judges have lately shown a strong tendency towards the doctrines of the civil law in relation to sales, and have been dis-

that he will make good any damage done to the tobacco by moulding.⁴⁹ If the seller warrants, on

is the more remarkable for the reason that the common-law judges at Westminster Hall have not heretofore been disposed to think very highly of the civil law, except where it coincided with their own; and it has been thought a strong trait of British character, that nothing in the institutions of other countries is esteemed of much value, unless it be also common to the laws and customs of England. I do not regret to find that there are men in Great Britain who can look beyond the shores of that island; but I feel no disposition to follow them in their new zeal for the civil law; for the reason that it is not our law, and the further reason, that our law in relation to sales is the best. The civil law implies a warranty where none was in fact made. The common law leaves men to make their own bargains. If the purchaser wants an undertaking that the goods are sound or merchantable, he asks for it; and then the vendor decides for himself whether he will make such a contract, or let it alone. Under the civil law it is not enough for the seller's protection that he deals honestly, and does not warrant the goods; but he must make an agreement that no agreement shall be implied against him. When charged with a warranty, he cannot safely answer, prove it; nor will it be enough for him to show that no warranty was in fact made; he must go further, and prove an agreement to be exempt from the consequences of a contract which he did not make.

"The last attempt with us to substitute the civil, for the common-law rule, was made in relation to a sale of flour, which proved to be bad. The attempt failed both in this court and the court of errors; *Hart v. Wright*, 17 Wend. 267, and *Wright v. Hart*, 18 Id. 449. We have made one inroad upon the common-law rule, and allowed a warranty to be implied on a sale by sample, that the bulk of the article corresponds in quality with the sample, exhibited: *Waring v. Mason*, 18 Id. 425. This exception to the general rule, although now firmly established, stands upon no principle. If the purchaser wants such a warranty, he should ask for it; and then the vendor will have the opportunity of saying whether he will consent to make such a contract or not. The law now makes it for him without his consent: and he can only get rid of that result by taking the precaution to agree at the time of the sale, that no contract which he does not make shall afterwards be implied against him. It would, I think, have been better had the maxim of *caveat emptor* been left unbroken."

⁴⁹ *Gerst v. Jones*, 32 Gratt. 518: 34 Am. Rep. 773.

notice that the buyer purchases to sell in another market, he is liable not only for actual loss but for contingent profit.⁵⁰

Action for fraud.—The buyer is not bound to rescind for fraud, but may keep the goods and recover damages.⁵¹ The measure of damages is the difference between the actual and the represented value.⁵² Sometimes consequential damages are allowed, as for example, where one knowingly sells diseased sheep he may be liable for infection of the buyer's other sheep.⁵³

Defences in suit for the price.—It is very generally held that in an action for the price the buyer may set up breach of warranty as a defence, in part or *in toto*.⁵⁴ Acceptance is not a conclusive bar,⁵⁵ and so of failure to notify the seller.⁵⁶ This defence may be made even in a case of a mere implied warranty,⁵⁷ and even in an action on a note given for the price, on the ground of failure of consideration, as between the original

⁵⁰ *Lewis v. Rountree*, 79 N. C. 122 ; 28 Am. Rep. 309 ; (rosin).

⁵¹ *Kimball v. Cunningham*, 4 Mass. 502 ; 3 Am. Dec. 230.

⁵² *Brock v. Clark*, 60 Vt. 551 ; *Stiles v. White*, 11 Metc. 356 ; 45 Am. Dec. 214.

⁵³ *Jeffrey v. Bigelow*, 13 Wend. 518 ; 28 Am. Dec. 476 ; *Wintz v. Morrison*, 17 Tex. 372 ; 67 Am. Dec. 658.

⁵⁴ *Bradley v. Rea*, 14 Allen, 20 ; *Marsh v. McPherson*, 105 U. S. 709 ; *Manuf. Co. v. Wood*, 84 Mich. 452.

⁵⁵ *Morse v. Moore*, 83 Me. 473 ; 23 Am. St. Rep. 783.

⁵⁶ *Weed v. Dyer*, 53 Ark. 155.

⁵⁷ *Gurney v. Atlantic, etc., Ry. Co.*, 58 N. Y. 358 ; *Kenworthy v. Stevens*, 132 Mass. 123.

parties.⁵⁸ In the same manner and to the same extent fraud may be set up in defence.⁵⁹

⁵⁸ *Perley v. Balch*, 23 Pick. 283 ; 34 Am. Dec. 56 ; *Ruff v. Jarrett*, 94 Ill. 475.

⁵⁹ *Carey v. Guillow*, 105 Mass. 18 ; *Dushane v. Benedict*, 120 U. S. 639 ; *Coburn v. Ware*, 30 Me. 202.

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